129-590
129-590

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1030.

STEWART B. SHOTWELL, PLAINTIFF IN ERROR,

vs.

SAMUEL A. MOORE, AS TREASURER OF HARRISON COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 29, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1030.

STEWART B. SHOTWELL, PLAINTIFF IN ERROR,

vs.

SAMUEL A. MOORE, AS TREASURER OF HARRISON COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	1	1
Waiver of summons	3	2
Transcript from circuit court of Harrison Co. marked "A"	4	2
Petition	4	2
Præcipe for summons	5	3
Summons	6	3
Sheriff's return	6	4
Answer	7	4
Reply	8	5
Order substituting Sam'l A. Moore as plaintiff	12	6
Finding of facts	12	6
Judgment	15	7
Clerk's certificate to record of court of common pleas	15	8
Petition in error in circuit court	16	8
Judgment of reversal	17	9
Clerks certificate	19	9
Motion to advance	19	10
Order granting motion to advance	20	10
Order dismissing cause for want of preparation	21	10
Motion to reinstate cause	21	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 11, 1889.

	Original.	Print.
Order granting motion to reinstate cause	23	11
Judgment	23	12
Clerk's certificate	26	13
Opinion	27	13
Reporter's certificate	39	20
Writ of error	40	21
Citation and proof of service of same	43	22
Bond	45	22
Assignment of errors	48	23

1 *Transcript.*

THE STATE OF OHIO, *City of Columbus:*

At a supreme court of the State of Ohio begun and held at the court-room, in the capitol, in the city of Columbus, on the third day of January, 1888, before the Hon. Selwyn N. Owen, chief justice; Hon. Thad. A. Minshall, Hon. Marshal J. Williams, Hon. William T. Spear, and Hon. Franklin J. Dickman, judges thereof.

STEWART B. SHOTWELL
vs.
SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio.

Error to the ciruit court of Harrison county.

Be it remembered that heretofore, to wit, on the 12th day of February, A. D. 1887, came said Stewart B. Shotwell, plaintiff in error, and filed in our said court the following petition in error, waiver of summons, and printed record, to wit:

Petition in Error.

In the Supreme Court of Ohio.

STEWART B. SHOTWELL, Pl'ff,
vs.
SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio, Def't.

2 The said plaintiff, Stewart B. Shotwell, complains of the defendant, Samuel A. Moore, treasurer of Harrison county, Ohio, for that, at the November term of the circuit court, A. D. 1886, for the county of Harrison, the said defendant, as such treasurer, recovered a judgment by the consideration of said court against the said Stewart B. Shotwell in a certain action then pending in said court, wherein the said Samuel A. Moore, as such treasurer, was plaintiff and the said Stewart B. Shotwell was defendant, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked "A," and made a part of this petition; and the said Stewart B. Shotwell avers that there is error in the said record and proceedings of the circuit court in this, to wit:

1. The said circuit court erred in reversing the judgment of the court of common pleas and rendering judgment against the said S. B. Shotwell.

2. The said judgment was given for the said Samuel A. Moore, as such treasurer, when it should have been given for the said Stewart B. Shotwell, according to the law of the land.

3 The said plaintiff therefore prays that the said judgment may be reversed and the said plaintiff restored to all things he has lost by reason thereof.

J. M. ESTEP,
Attorney for Plaintiff in Error.

Said waiver of summons filed therewith is as follows, to wit:

Waiver of Summons.

In the Supreme Court of the State of Ohio.

STEWART B. SHOTWELL, Plaintiff in Error,
vs.
SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio, Defendant in Error.

The undersigned defendant in error hereby enters his appearance in the above action and waives the issuing of summons or other notice to him. He also acknowledges the receipt of two copies of the printed record of the case.
Jan. 31st, 1887.

SAMUEL A. MOORE,
As Treasurer of Harrison County, Ohio,
By JOHN M. GARVEN AND
D. A. HOLLINGSWORTH,
His Attorneys.

Said printed record filed therewith and referred to in said petition in error as "copy of record marked A" is as follows, to wit:

4 *Copy of Record "A."*

THE STATE OF OHIO, } *ss:*
Harrison County, }

In Common Pleas Court. September Term, 1886.

ALBERT J. HARRISON, as Treasurer of Harrison County, Ohio,
vs.
STEWART B. SHOTWELL.

Civil action.

Be it remembered that heretofore, to wit, February 19th, 1886, plaintiff filed in the office of the clerk of the court of common pleas of Harrison county, Ohio, his petition, which is in the words and figures following, to wit:

Petition.

In the Court of Common Pleas of Harrison County, Ohio.

ALBERT J. HARRISON, as Treasurer of Harrison County, Ohio,
Plaintiff,
vs.
STEWART B. SHOTWELL, Defendant.

The plaintiff, Albert J. Harrison, says he is the duly elected, commissioned, qualified, and acting treasurer of Harrison county, Ohio. Plaintiff says that personal taxes to the amount of twenty-three

hundred and twenty-four dollars and eighty-nine cents stand charged against the defendant, S. B. Shotwell, on the duplicate of taxes of said county placed in the hands of this plaintiff for collection by the auditor of said county, which said taxes are due and unpaid, and said defendant is indebted to said Albert J. Harrison, as treasurer of said county, in the sum of $2,324.89, the sum charged against defendant as tax as aforesaid.

Wherefore plaintiff says there is due to him, as such treasurer, from said defendant $2,324.89, with interest from this date, February 19th, 1886, and he therefore asks judgment against said defendant for said sum of $2,324.89, with interest from February 19th, 1886, and costs of this suit.

J. M. GARVEN,
Attorney for Plaintiff.

STATE OF OHIO, }
Harrison County, } *ss:*

Albert J. Harrison, treasurer of Harrison county, Ohio, being duly sworn, says the allegations of his foregoing petition are true, as he believes.

A. J. HARRISON.

Sworn to before me by said Harrison and signed by him in my presence February 19th, 1886.

E. B. McNAMEE, *Clerk.*

Precipe.

ALBERT J. HARRISON, as Treasurer of Harrison County, Ohio,
Plaintiff,
vs.
STEWART B. SHOTWELL, Defendant.

Issue summons; endorse; amount claimed, $2,324.89, with interest from February 19th, 1886.

J. M. GARVEN,
Attorney for Plaintiff.

To E. B. McNamee, clerk.

February 19th, 1886, summons issued, to wit:

THE STATE OF OHIO, }
Harrison County, } *ss:*

To the sheriff of Harrison county, Greeting:

You are commanded to notify Stewart B. Shotwell that he has been sued by Albert J. Harrison, as treasurer of Harrison county, Ohio, in the court of common pleas of Harrison county, and that unless he answers by the 20th day of March, A. D. 1886, the petition of said plaintiff against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 1st day of March, A. D. 1886.

Witness my hand and the seal of said court, at Cadiz, Ohio, this 19th day of February, A. D. 1886.

[SEAL.] E. B. McNAMEE, *Clerk.*

February 20, 1886, summons returned endorsed:

THE STATE OF OHIO, } ss:
Harrison County, }

By virtue of the command of the within summons I served S. B. Shotwell by delivering to him personally a certified copy of this writ on the 20th day of February, A. D. '86.

J. C. GLOVER, *Sheriff.*

Fees, 78 cents.

7 March 20th, 1886, answer filed, to wit:

Answer.

In the Court of Common Pleas of Harrison County, Ohio.

ALBERT J. HARRISON, Treasurer of Harrison County, Ohio, Plaintiff,

vs.

STEWART B. SHOTWELL, Defendant.

The defendant, S. B. Shotwell, says that the taxes claimed, to wit $2,324.89, were put on and charged against him by the auditor of said county on the additional duplicate on the several sums placed on said duplicate lately, to wit, February, 1886, as follows: For the year '81, $30,900; for the year '82, $26,900; for the year '83, $29,550; for the year '84, $18,560; for the year '85, $7,420; and he says that said sums were not legally put upon said duplicate, and the taxes thereon were not duly levied, as alleged. He says he made no return of said several sums for taxation in said several years, because he says that he held said sums (or nearly said several sums, but not quite so much) when he was required to list and take account of said property for assessment, to wit, on the day preceding the second Monday of April, in said respective years, in United States obligations, to wit, United States notes, commonly called greenbacks, and he claims that said obligations are not liable to State taxation
8 by law, either directly or indirectly, and that the said county auditor had no legal authority to place said several amounts on the duplicate and assess said taxes thereon, and the said treasurer has no legal authority to collect the same. He therefore denies that he is indebted to the plaintiff in the sum of $2,324.89 or any other sum for unpaid taxes, as aforesaid; wherefore he prays judgment, and that plaintiff be enjoined from collecting or attempting to collect the same.

J. M. ESTEP AND
S. B. SHOTWELL,
For Defendant.

THE STATE OF OHIO, } ss:
Harrison County, }

S. B. Shotwell, being sworn, says that the facts stated in his foregoing answer are true, as he believes.

S. B. SHOTWELL.

Sworn to by the said S. B. Shotwell before me and signed by him in my presence this 20th day of March, '86.

E. B. McNAMEE, *Clerk.*

Afterward, April 6th, '86, term time, the plaintiff has leave to withdraw the demurrer on file herein and file a reply instanter, which is accordingly done.

April 6th, '86, reply filed, to wit:

Reply.

In the Court of Common Pleas of Harrison County, Ohio.

ALBERT J. HARRISON, as Treasurer of Harrison County, Ohio, Plaintiff,

vs.

STEWART B. SHOTWELL, Defendant.

1st reply. The plaintiff, Albert J. Harrison, as treasurer of Harrison county, Ohio, for a first reply to the answer of the defendant, says that he denies that the defendant, on the days preceding the second Monday of April, in the years '81, '82, '83, '84, and '85, held in United States obligations, commonly called "greenbacks," the various sums alleged in his answer; and he avers that on said days the defendant had in bank sums of money corresponding in amount to said sums and he was then entitled to withdraw the same in money on demand, and said several sums not having been returned to the assessor for taxation at the proper time they were afterwards placed upon the duplicate by the auditor of said county according to law, and the said taxes were duly and properly charged and levied thereon against the defendant.

2nd reply. The plaintiff, for a second reply to the answer of defendant, says that during the years 1881, 1882, 1883, 1884,
10 and 1885 the said defendant had continuously (except as hereinafter stated) on deposit in bank subject to check large sums of money which were not returned to the assessor for taxation, but were, to avoid the payment of taxes, concealed and kept off the duplicate by the defendant, who each year, on the day preceding the day on which personal property is required to be listed for taxation and for the purpose aforesaid, drew a check or checks for the amount then so on deposit and required the cashier to formally pay the same in United States securities, commonly called "greenbacks," which were not removed, but left in the bank with the cashier, and on the day after the day on which such property is required to be listed for taxation the same were again, according to defendant's

directions, entered by the cashier in the general deposit account of the defendant, subject to check as before. The plaintiff says that in this way the defendant claimed to hold *the* "greenbacks" on the days preceding the second Monday of April in each of the years the several sums stated in the answer, and in no other way did he hold or control such sums in "greenbacks;" and the plaintiff avers
11 that said sums were not greater than the monthly average amount and value of the deposits subject to check held and controlled by the defendant during the preceding year, and which were for said one day claimed to be converted as aforesaid into such United States securities. The defendant made no return in either of said years of the monthly average value of the property or deposits so claimed to be converted by him into United States securities for the time he held or controlled the same within the year preceding, as he was required to do by law, and the auditor of said county, having ascertained the fact, legally placed the same on the duplicate, and the taxes for which this action is brought were duly levied and charged thereon in pursuance of the statutes in that behalf.

Wherefore the plaintiff prays judgment as in the petition.

JNO. M. GARVEN AND
D. A. HOLLINGSWORTH,
Attorneys for Plaintiff.

STATE OF OHIO, }
Harrison County, } *ss:*

Albert J. Harrison, being first duly sworn, says the facts stated in his foregoing reply as treasurer of Harrison county, Ohio, are true, as he believes.

ALBERT J. HARRISON.

12 Sworn to by Albert J. Harrison before me and subscribed by him in my presence this 5th day of April, 1886.

E. B. McNAMEE, *Clerk.*

Afterward, to wit, October 1st, 1886, being term time—

It appearing to the court that the term of office of Albert J. Harrison, as treasurer of Harrison county, Ohio, has expired, his successor, Samuel A. Moore, is hereby substituted for the said plaintiff, and it is ordered that the action shall hereafter be carried on in his name as plaintiff.

Finding of Facts.

October 1st, '86. Term Time.

The parties to this cause having waived a jury, the same came on for trial to the court, and the parties, with a view of excepting to the decision of the court upon the questions of the law involved in the trial, having requested the court to state in writing the conclusions of fact found separately from the conclusions of law, and the

testimony having been heard, the court finds as conclusions of fact as follows:

That the defendant is and for many years has been a resident of Harrison county, Ohio; that on the Saturday preceding the second Monday of April, in the years 1881, '82, '83, '84, and '85, the
13 defendant had on deposit in bank, at the town of Cadiz, in said county, to his credit as a general depositor, the following sums: In 1881, $30,900; in '82, $26,900; in '83, $29,550; in '84, $18,560; in '85, $4,700; that on said Saturday in each of said years he checked out the said balance so standing to his credit and at his request the same was paid to him in United States securities commonly called "greenbacks;" that on each occasion after counting the money so paid to him he enclosed the same in a package, wrote his name thereon, and returned the same to the officer of the bank, requesting him to place the same in the bank's safe for him, which was done. On no occasion did the defendant carry the money out of the bank building; and in the early part of the next week in each of said years he returned to the bank and demanded his package, which was given him, and he opened the same and delivered it to an officer of the bank, asking that the amount should be placed to his credit as a general depositor, which was done; that on each occasion the defendant drew out the balance due him with intent to obtain non-taxable securities, and thereby evade taxation
14 on such balance; but that on each occasion during the time which intervened between the withdrawal and the subsequent deposit as a general depositor he was *bona fide* the absolute owner of the money so withdrawn, and the same was subject to his disposal; that he did not in either of said years list for taxation any part of the money so paid to him nor did he list the monthly average amount or value, for the time he held or controlled the same within the preceding year, of any moneys, credits, or other effects within that time invested in or converted into the said securities so by him drawn out of bank, and that said monthly average amount so invested by the defendant in such securities within the years, respectively, preceding the drawing out of said moneys was the amount so drawn out at the end of the year; that the auditor of said county placed said several sums upon the duplicate of said county for the year 1885, except for the year '85 he erroneously placed $4,949, with fifty per cent. added thereto, making $7,420, whereas the data before him and by which he should have been controlled authorized only $4,700, which with fifty per cent. added would
15 make $7,050; and the court further finds that the amount of taxes chargeable upon the aggregate of said several sums, if the same are subject to taxation, is $2,317.05, and that said duplicate was delivered to the treasurer of said county for collection.

Judgment.

And the court being of opinion that, upon the facts so found, the law of this case is with the defendant, it is thereupon considered that the defendant recover of the plaintiff his costs herein expended,

taxed at $20.60; to which ruling of the court as to the law of the case and to the judgment so rendered the plaintiff excepts, and his exception in that behalf is here noted.

I, E. B. McNamee, clerk of the court of common pleas within and for the county of Harrison and State of Ohio, do hereby certify that the foregoing writing is an exact copy of the final record in the court of common pleas in the above-entitled cause truly taken from Record W of said court.

E. B. McNAMEE,
Clerk of Common Pleas Court, Harrison County, Ohio.

16 *Petition in Error in Circuit Court.*

STATE OF OHIO, }
Harrison County, } *ss:*

Circuit Court.

SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio, Plaintiff,
vs.
STEWART B. SHOTWELL, Defendant.

Petition in error.

The said Samuel A. Moore, treasurer of Harrison county, Ohio, plaintiff, complains of the said defendant, Stewart B. Shotwell, for that the said defendant, at the September term of the court of common pleas of Harrison county, Ohio, A. D. 1886, recorded a judgment by the consideration of said court against the said plaintiff in a certain action then pending in said court, wherein the said Samuel A. Moore, treasurer of Harrison county, Ohio, was plaintiff and the said Stewart B. Shotwell was defendant, a copy of the record of the judgment and proceeding- in which case, duly certified, is hereunto attached, marked "A," and made a part of this petition. The original papers in said cause are also filed herewith.

The said plaintiff avers that there is error in the said record and proceedings in this, to wit:

17 1. That the said court erred in the conclusion of law from the facts of the case as found by the court.

2. That the conclusion of law found by the court is not supported by the facts of the case.

3. The judgment was given for the said Stewart B. Shotwell when it ought to have been given for the said Samuel A. Moore, as treasurer of Harrison county, Ohio, according to the law of the land.

Wherefore the said Samuel A. Moore, treasurer of Harrison county, Ohio, prays that the said judgment may be reversed and the said plaintiff be restored to all things he may have lost by reason thereof.

J. M. GARVEN AND
D. A. HOLLINGSWORTH,
Attorneys for Plaintiff.

OCTOBER 14TH, 1886.

The defendant, S. B. Shotwell, hereby appears and waives the issuing and service of a summons in error in this case.

J. M. ESTEP,
Attorney for Defendant in Error.

Judgment of Reversal.

Afterwards, to wit, November 29th, 1886, being circuit court term time.

This day came the parties, by their attorneys, and this
18 cause, coming on to be heard upon the errors assigned, was argued by counsel. Upon consideration whereof *and* this court, being fully advised in the premises, do find that there is error in the record and proceedings of the court of common pleas, as alleged in the petition in error; to which finding said defendant Shotwell excepts.

It is thereupon ordered and adjudged by this court that the said judgment of the court of common pleas of Harrison county, Ohio, in favor of this defendant and against the plaintiff in error be, and the same is hereby, reversed, at the costs of this defendant.

To which said defendant Shotwell excepts.

And this court proceeding now, according to law, to render the judgment which said court of common pleas should have rendered in said action in said court, it is considered, ordered, and adjudged by this court that the plaintiff, Samuel A. Moore, as treasurer of Harrison county, Ohio, recover of said defendant, Stewart B. Shotwell, the sum of twenty-four hundred and twenty-two dollars and seven cents, debt (counting interest to the first day of this term of this court, to wit, November 23d, 1886), to which said de-
19 fendant excepts; and also the sum of $20.60, the costs of the trial in said court of common pleas, to which said defendant excepts; and also the costs of this proceeding in error, taxed at $—; to all of which said defendant excepts.

I, E. B. McNamee, clerk of the circuit court within and for the seventh judicial circuit in and for Harrison county, Ohio, do hereby certify that the above writing is an exact copy of the petition and journal entry in the above-entitled cause, truly taken from the journal of said circuit court.

E. B. McNAMEE,
Clerk of the Circuit Court, Harrison County, Ohio.

And afterward, on the 16th day of February, A. D. 1887, the following motion was filed in the clerk's office of our said supreme court, to wit:

Motion.

In the Supreme Court of Ohio.

STEWART B. SHOTWELL, Plaintiff in Error,
vs.
SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio, Defendant in Error.

Error to the circuit court of Harrison county.

Motion to take cause out of its order on the docket.

20 Now comes the defendant, Samuel A. Moore, as treasurer of Harrison county, Ohio, and moves the court to take up and dispose of this case in advance of its order on the docket, for reasons following, to wit:

1. It involves the validity of a tax levied against the plaintiff in error.
2. It involves the power of the duly authorized officers of Harrison county to levy such tax.
3. It involves the construction and constitutionality of a statute of the State.
4. The questions arising in the case are of general public interest.

JOHN M. GARVEN AND
D. A. HOLLINGSWORTH,
Att'ys for Defendant in Error.

Rec'd of the above-named attorneys for def't in error a copy of the above motion, and also a notice that the same would be presented for hearing to the supreme court on Tuesday, Feb. 22d, or as soon thereafter as the same can be heard.

Cadiz, Feb. 14th, 1887.

J. M. ESTEP,
Att'y for S. B. Shotwell, Pl'ff in Error.

And afterward, at the January term, A. D. 1887, of our said supreme court, to wit, Tuesday, March 1st:

Entry.

21 Ordered by the court that the motion be, and the same hereby is, granted.

And afterward, at said January term, A. D. 1887, to wit, Tuesday, September 27th:

Entry.

Ordered by the court that this cause be dismissed for want of preparation.

And afterward, on the 18th day of October, A. D. 1887, the following motion was filed in the clerk's office of our said supreme court, to wit:

Motion.

In the Supreme Court of Ohio.

STEWART B. SHOTWELL
vs.
SAMUEL A. MOORE, Treas. of Harrison County, Ohio.

This cause, No. 1088, was dismissed for want of preparation Sept. 27th, 1887, and the plaintiff now moves the court to reinstate the same upon the docket for hearing.

The question to be determined is on important tax question, and the plaintiff expected to be ready for hearing by the court as soon as it convened after the summer vacation, but his att'y, J. M. Estep, met with a serious accident, which confined him to the house and prevented his attending — business for some months, and he
22 was thus unable to complete his brief in the time expected, although it was expected and hoped that he would be able to do so.

If the case is reinstated the plaintiff will be ready for a hearing as soon as his brief can be printed.

He therefore respectfully asks that the same be reinstated.

S. B. SHOTWELL,
By his att'y, J. M. ESTEP.

S. B. SHOTWELL *vs.* SAMUEL A. MOORE, Treasurer.

The defendant hereby acknowledges service of the notice of the within motion.

October 17th, 1887.

D. A. HOLLINGSWORTH,
J. M. GARVEN,
Att'ys for Def't.

In Supreme Court.

S. B. SHOTWELL *vs.* S. A. MOORE, Treasurer.

J. M. Estep, being sworn, says that the facts stated in the foregoing motion for a reinstatement of this case on the docket are true.

J. M. ESTEP.

Sworn to & subscribed before me this 17th October, 1887.
[SEAL.] W. G. ESTEP,
Notary Public.

23 And afterward, at the said January term, A. D. 1887, to wit, Tuesday, October 25th:

Entry.

Ordered by the court that said motion be, and the same is hereby, granted, and thirty days allowed to file plaintiff's printed brief.

And afterward, at the January term, A. D. 1888, of our said supreme court, to wit, Tuesday, May 1st:

Decree.

This cause came on to be heard upon the transcript of the record of the judgment and proceedings of the circuit court of Harrison county, Ohio, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court of Harrison county, Ohio, be, and the same is hereby, affirmed, and that the defendant in error recover of the plaintiff in error his costs herein expended, taxed at $—; and this court being of opinion that there was reasonable cause for this proceeding in error, it is therefore ordered that no penalty, additional interest, or counsel fee be taxed, adjudged, or awarded against the plaintiff in error. It is further ordered that a special man-
24 date be sent to the court of common pleas of Harrison county, Ohio, to carry this judgment into execution. It is further ordered that a copy of this entry be certified to the circuit court of Harrison county, Ohio, for entry. Whereupon, on motion of said plaintiff in error, this court order it to be certified and made part of the record in this case and of the above-mentioned judgment and entry of affirmance that in the rendition of said judgment of affirmance it became and was material to the case to determine whether subdivision 16 of section 2737 of the Revised Statutes of the State of Ohio, passed June 20th, 1879, to take effect on the 1st day of January, A. D. 1880, entitled "An act to revise and consolidate the general statutes of Ohio," was of binding force and validity against the said plaintiff in error.

The court order it to be further certified that said plaintiff in error claimed and asked this court to hold that said subdivision 16 of said section 2737 of the Revised Statutes of Ohio, so far as the same required him to list and return for taxation the monthly average amount or value for the time he held or controlled the same within the preceding year of all moneys, credits, or other effects within that time invested in or converted into securities of the United
25 States not taxed, to the extent he might have held or controlled such securities on the day preceding the second Monday of April, in the years 1881, 1882, 1883, 1884, and 1885, is in violation of and repugnant to section 3701 of the Revised Statutes of the United States, approved June 2d, 1874.

And this court order it to be further certified that this court decided and adjudged that said subdivision 16 of said section 2737 of the Revised Statutes of Ohio was not in violation of nor repugnant to said section 3701 of the Revised Statutes of the United States in either of the particulars it was claimed to be so by said plaintiff in error, and decided and adjudged that said subdivision 16 of said section 2737 of the Revised Statutes of Ohio was and is valid and binding upon said plaintiff in error, and thereupon affirmed the judgment of said circuit court of Harrison county, Ohio, and ordered

a special mandate to carry said judgment into execution, as is above shown.

And it is further ordered by this court to be certified that the question of the validity of said subdivision 16 of said section 2737 of the Revised Statutes of Ohio in the particulars mentioned as
26 aforesaid was drawn in question on the hearing and decision of this case as being repugnant to said section 3701 of the Revised Statutes of the United States, and that the decision of this court was in favor of the validity of said subdivision 16 of said section 2737 of the Revised Statutes of Ohio as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had.

STATE OF OHIO, *City of Columbus:*

I hereby certify that the foregoing is a true copy of the record and of the assignment of errors and of all proceedings in the above-entitled cause, and that I have annexed to and transmitted with this record a copy of the opinion filed in the case.

Witness my name and the seal of our supreme court this 12th day of June, 1888.

[Seal of the Supreme Court of the State of Ohio.]

URBAN H. HESTER,
Clerk of Supreme Court of Ohio.

27 Supreme Court of Ohio.

SHOTWELL *v.* MOORE.

Error to the circuit court of Harrison county.

1. Subdivision 16 of section 2737 of the Revised Statutes of Ohio, which provides that the statement of each person required to list property shall set forth "the monthly average amount of value for the time he held or controlled the same within the preceding year of all moneys, credits, or other effects within that time invested in or converted into bonds or other securities of the United States," is not in conflict with section 3701 of the Revised Statutes of the United States, which provides that "all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under State, municipal, or local authority."
2. The method provided in subdivision of section 2737 for estimating the taxable value of property converted during the year into non-taxable securities is not in conflict with section 2 of article XII of the constitution of this State, which requires that laws shall be passed taxing all property by a uniform rule according to its true value in money.

The original action was commenced in the court of common pleas of Harrison county by Albert J. Harrison, as treasurer of Harrison

county, against Stewart B. Shotwell, the plaintiff in error. The original petition reads as follows:

"The plaintiff, Albert J. Harrison, says he is the duly elected, commissioned, qualified, and acting treasurer of Harrison county, Ohio.

"Plaintiff says that personal taxes to the amount of twenty-three hundred and twenty-four dollars and eighty-nine cents stands charged against the defendant, S. B. Shotwell, on the duplicate of taxes of said county placed in the hands of this plaintiff for collection by the auditor of said county, which said taxes are due and unpaid and said defendant is indebted to said Albert J. Harrison, as treasurer of said county, in the sum of $2,324.89, the sum charged against defendant as tax as aforesaid.

28

"Wherefore plaintiff says there is due to him, as such treasurer, from said defendant $2,324.89, with interest from this date, February 19th, 1886, and he therefore asks judgment against said defendant for said sum of $2,324.89, with interest from February 19th, 1886, and costs of this suit."

The defendant answered as follows:

"The defendant, S. B. Shotwell, says that the taxes claimed, to wit, $2,324.89, were put on and charged against him by the auditor of said county on the additional duplicate on the several sums placed on said duplicate lately, to wit, February, 1886, as follows:

"For the year '81, $30,900.
"For the year '82, 26,900.
"For the year '83, 29,550.
"For the year '84, 18,560.
"For the year '85, 7,420.

"And he says that said sums were not legally put upon said duplicate, and the taxes thereon were not duly levied, as alleged. He says he made no return of said several sums for taxation in said several years, because he says that he held said sums (or nearly said several sums, but not quite so much) when he was required to list and take account of said property for assessment, to wit, on the day preceding the second Monday of April, in said respective years, in United States obligations, to wit, United States notes, commonly called greenbacks, and he claims that said obligations are not liable to State taxation by law, either directly or indirectly, and that the said county auditor had no legal authority to place said several amounts on the duplicate and assess said taxes thereon, and the said treasurer has no legal authority to collect the same. He therefore denies that he is indebted to the plaintiff in the sum of $2,324.89 or any other sum for unpaid taxes, as aforesaid; wherefore he prays judgment, and that plaintiff be enjoined from collecting or attempting to collect the same."

29

The plaintiff filed a reply.

The parties having waived a jury, the cause was tried to the court, and the parties with a view of excepting to the decision of the court upon the questions of law involved in the trial and having requested the court to state in writing the conclusions of fact found separately from the conclusions of law, and the testimony having been heard,

the court found its conclusions of fact, which are sufficiently stated in the opinion herein; and the court of common pleas being of opinion that upon the facts so found the law of the case was with the defendant, it was thereupon considered that the defendant recover of the plaintiff his costs expended, taxed at — dollars.

The circuit court, on petition in error filed by Samuel A. Moore, as the then treasurer of Harrison county, reversed the judgment of the court of common pleas and adjudged that Samuel A. Moore, as treasurer of Harrison county, recover of Stewart B. Shotwell the sum of twenty-four hundred and twenty-two dollars and seven cents, debt.

To reverse the judgment of the circuit court this proceeding is instituted.

J. M. Estep and Harrison, Olds & Marsh, for plaintiff in error; J. M. Garven and D. A. Hollingsworth, for defendant in error.

DICKMAN, *J.*:

It is not claimed by the defendant in error that United States notes, commonly called "greenbacks," are directly or indirectly subject to taxation by or under State or municipal authority. They are obligations of the United States, and that their value may not be impaired and that they may promote the object for which they are issued, they should be beyond the taxing power of the States. The authority to borrow money on the credit of the United States is among the enumerated powers expressly vested by the Constitution in the National Government, and, as within the sphere of those powers that Government has been made supreme, the States cannot by taxing its notes or other obligations impair its ability to raise money for necessary governmental purposes. Bank *v.* Supervisors, 7 Wall., 26; The Bank *v.* The Mayor, *Id.*, 16. The constitutional grant to borrow money negatives in itself the right of the States to control or restrain by any method the exercise of the granted power; yet, to preserve the credit and value of the national securities and obligations, Congress has enacted, by section 3701 of the Revised Statutes of the United States, that "all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority."

The question that engages our attention at the outset is whether subdivision 16 of section 2737 of the Revised Statutes of Ohio is, in its operation and effect, in conflict with the meaning and intention of section 3701 of the Revised Statutes of the United States. By the tax laws of Ohio each person required to list property must annually make out and deliver to the assessor a statement of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation as owner, holder, or otherwise. As provided by subdivision 16 of section 2737, the person listing must truly and distinctly set forth in such state-

ment "the monthly average amount or value, for the time he held or controlled the same within the preceding year, of all moneys, credits, or other effects within that time invested in or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or
31 securities on said day preceding the second Monday of April."

As conclusions of fact found by the court of common pleas the plaintiff in error, on the Saturday preceding the second Monday of April, from the year 1881 to the year 1885, inclusive, had moneys in varying amounts on deposit in bank at the town of Cadiz, in Harrison county, to his credit as a general depositor. In each of those years and on the Saturdays above named he checked out the balance then standing to his credit, which, at his request, was paid to him in United States securities, commonly denominated "greenbacks." These securities he inclosed on each occasion in a package with his name thereon, and the officer of the bank placed it in the bank's safe for him. At no time did he carry the securities out of the bank building. In each year and in the early part of the next week after converting his balances into United States securities he returned to the bank, opened his package, delivered the contents to an officer of the bank, and the same were placed to his credit as a general depositor. In drawing out the balance due him it was his design, in each instance, to obtain non-taxable securities and thus evade taxation on such balance. During the interim between the withdrawal of his balance and his subsequent deposit as a general depositor he was the absolute owner of all moneys so withdrawn by him, and in no year did he list any portion of such moneys for taxation, nor did he include in his tax return the monthly average amount or value, for the time he held or controlled the same within the preceding year, of any moneys, credits, or other effects within that time invested in or converted into United States securities; but the monthly average amount of moneys so invested by the plaintiff in error in such securities within the years respectively preceding the drawing out of such moneys was the amount so drawn out at the end of the year. This monthly average amount of moneys held and controlled during each year preceding the time of their conversion into
32 United States notes was placed by the auditor upon the duplicate, which was delivered to the treasurer for collection, and it is contended that the Government securities were thereby indirectly subjected to State taxation, in violation of the act of Congress.

It is manifest from an examination of the provisions of subdivision 16 of section 2737 of the Revised Statutes that it was not the legislative intent nor does the statute operate to subject to taxation the Treasury notes or other obligations of the United States. Personal property converted into those securities may be taxable, but the securities are thereafter exempt from taxation. The statute recognizes and enforces the equitable principle that personal property held during a part of the year and then converted into non-taxable securities should be taxed in proportion to the time it is so held before being thus converted. The owner is required to list for

taxation the monthly average amount or value of moneys, credits, or other effects during the time he held or controlled the same within the preceding year. A statutory guide for ascertaining such monthly average is afforded in the mode prescribed by section 2740 of the Revised Statutes for estimating the average value of the stock in trade which a merchant shall have had from time to time in his possession during the year next previous to the time of making his statement to the assessor. That section provides that the average shall be made up by taking the amount in value on hand as nearly as may be in each month of the next preceding year in which the person making such statement shall have been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that the person making the statement may have been engaged in business during the preceding year. The monthly average amount or value of moneys, credits, or other effects invested in non-taxable securities being once determined, that amount, upon a reasonable interpretation of the statute, should be taxed
33 for that portion of the year during which the person listing held or controlled the property in its original shape. If, for example, in the month of October, six months prior to the day as of which property is to be listed for taxation, a citizen of the State should invest a sum of money in United States notes, as it would contravene the Federal statute to tax the securities into which the money had been merged, so to exempt the money from taxation for the six months it had received the protection of the State would be unequal and unjust; nor can the taxing of money as such up to the time it assumes the form of Government notes or other obligations of the United States be properly construed as virtually imposing a tax upon those non-taxable securities. The burden of taxation is thrown off as soon as the taxable personal property is converted into United States securities.

The principle of taxation for a proportionate period of the year is embodied in the statutory mode of taxing unincorporated banks and bankers. Persons commencing the business of banking after the day preceding the second Monday of April, the average value of whose personal property intended to be employed in such business shall not have been previously entered on the assessor's list for taxation, are required to pay into the county treasury a sum which shall bear the same proportion to the levy for all purposes on the average value so employed as the time from the day on which they engaged in such business to the day preceding the second Monday in April next succeeding shall bear to one year.

While the State statute cannot operate to subject to taxation Government obligations known as "greenbacks," it could not be effective in any degree to bring them into disfavor or to discourage investment in that class of Federal securities. The statute may aid in preventing persons using United States notes as a means of fraudulently evading their duty to the State as tax-payers, but the effect of the statute is to hold out an inducement or make it an
34 object to permanently convert idle and unproductive taxable property into Government obligations at the beginning in-

stead of the end of the year to increase the duration of investment, and thus stimulate the demand for such non-taxable securities.

It is urged, however, in argument of counsel that the method provided in subdivision 16 of section 2737 of the Revised Statutes for estimating the taxable value of the property therein designated is in conflict with section 2 of article XII of the constitution of the State, which requires the passage of laws taxing all property "by a uniform rule, according to its true value in money," in this, that the rule for the valuation of property converted into non-taxable securities by estimating its monthly average amount or value is different from that provided for the valuation of other kinds of property, which are assessed according to their value on a specified day. The question raised carries with it the obvious suggestion that property must be returned for taxation at its true value in money at a time when it is a legitimate subject for State taxation, and not when it has ceased to be such through the act of the owner himself in seeking an investment in non-taxable securities.

It is true that article XII is not a grant of power, but a regulation of power already granted—not a delegation of authority to raise revenue, but a limitation of that power as conferred by section 1 of article II of the constitution (Baker *v.* Cincinnati, 11 O. St., 534; Telegraph Co. *v.* Mayer, 28 O. St., 521); but, while the constitution prescribes that all property shall be taxed by a uniform rule, with a view to apportioning the burdens of government so that each person shall contribute so much as is his reasonable proportion and no more, it does not prescribe the mode of ascertaining the taxable valuation of property or the time as of which the value is to be determined. The method of ascertaining the true value of property in money and the time as of which the same shall be listed
35 for taxation have been left to the wisdom of the Legislature.

"Whenever it is made a requirement of the State constitution that taxation shall be upon property according to value such a requirement implies an assessment of valuation by public officers at such regular periods as shall be provided by law" (Cooley, Const. Lim., 496); and where the constitution contains no provisions upon this subject "the necessity for valuation," says the same author, "is nevertheless implied, though the mode of making it and the periods at which it shall be made are left to the legislative discretion." *Ib.;* see also Exchange Bank *v.* Hines, 3 O. St., 1–22.

In the exercise of that discretion the General Assembly, for the purposes of taxation, has provided for estimating the value of certain species of property by different modes and agencies for ascertaining the value as at different times and for listing property as of different days. Thus the person making a tax return may exhibit to the assessor certain enumerated articles and allow him to fix the value thereof, while he must verify by his oath the value of all other items included in his return. The merchant is required to set forth in his return the monthly average value of personal property appertaining to his business and which he has held during the previous year, the manufacturer the monthly average value of all articles had on hand during the year for the purpose of being used

in manufacturing, and unincorporated banks and bankers the monthly average amount of certain specified items owned or standing on their books during the preceding year, while numerous other classes of property are assessed according to their value on a particular day; and while personal property generally must be listed for taxation as of the day preceding the second Monday in April shares in incorporated banks are listed as of the Wednesday next preceding the second Monday of May in each year. These and other diversities in valuation grow out of difficulties necessarily incident to the ascertainment of the
36 true value of property in money. There are so many influences, tangible and intangible, which cause values to fluctuate from time to time that absolute equality and uniformity of valuation are unattainable, and an approximation thereto is all that is practicable.

But because of such unavoidable inequalities in valuations for taxation we are not to conclude that there is any material variation from the principle of taxing all property by a uniform rule, according to its true value in money. Wagoner *v.* Loomis, 37 O St., 571; National Bank *v.* Kimball, 103 U. S., 732. Taxation of one class of personal property based upon an estimate of its monthly average value during the next preceding year, while the value of a different class on a specified day is adopted, is not a departure from the rule of uniformity. The application of the principle of average valuation to the business of merchants and manufacturers has long received the legislative sanction of this State without, in our judgment, infringing the constitution, and we discover no valid reason why the same principle may not be applied to the monthly average amount of moneys invested in United States securities. Instead of being at variance with a uniform rule or rate of taxation it may properly be regarded as an authorized legislative mode of preventing an evasion of the law and securing a fair basis for an equal and just apportionment to the property-owner of the necessary burdens of taxation. The residue of a merchant's stock in trade held at the time when by law he is required to make his tax return would prove a very deceptive criterion of the taxable personal property held from month to month during the preceding year. "It has been argued," says Bartly, C. J., in Exchange Bank *v.* Hines, *supra*, "that stock in trade is subject to a different rule of taxation from that which is imposed on other property. This is a mistake. The difference consists not in the rule or burden of taxation, but simply in the mode of ascertaining the valuation. The principle of valuing by an
37 average has been introduced because stock in trade is constantly changing the article of its investment and varying in the quantity on hand from month to month."

It is clear that it was the design of the plaintiff in error in annually drawing his balance from the bank and converting it into United States notes to avoid the payment of his just proportion of taxes, and that the transaction was, in effect, a fraud upon the revenue; and it is contended that where the investment in non-taxable securities is colorable only—not designed to be permanent, but made to evade taxation and with the predetermined purpose of reconvert-

ing the securities at the earliest day after the assessor's visit—a party cannot in this manner acquire rights which a court, either of law or equity, will enforce. How far the rights of a party in a court of law may depend upon the motives which actuated him in making the investment the decision of the case at bar does not require us to determine; but it is now well settled that where a party, for the sole purpose of escaping taxes, converts his personal property into United States securities, a court of justice, sitting as a court of equity, will not lend its aid for the accomplishment of any such purpose.

In Mitchell *v.* Commissioners, 91 U. S., 206, a party, for the purpose of evading the payment of a tax on his money on deposit, which the law of Kansas required to be listed for taxation March 1 in each year, withdrew it, February 28, from a bank where it was subject to his check, converted it into notes of the United States, and deposited them to his general credit March 3, and the State court passed a decree dismissing a bill in equity by him filed to restrain the collection of the tax thereon. It was held, Waite, C. J., delivering the opinion of the court, that the decree was correct, and that, although such notes were exempt from taxation by or under State or municipal authority, a court of equity would not use its extraordinary powers to promote such a scheme, devised for the pur-
38 pose of enabling a party to escape his proportionate share of the burdens of taxation. See also Albany City Bank *v.* Maher, 19 Blatchf., 182.

The original action herein was at law with prayer for a money judgment; but the county treasurer, claiming protection under the duplicate, was clothed with power at any time to distrain sufficient goods and chattels of the defendant, if found within his county, to pay taxes remaining due. The defendant therefore in his answer invoked the equity powers of the court and prayed that the plaintiff be enjoined from collecting or attempting to collect the amount charged against him on the duplicate. The court rendered judgment for the defendant instead of granting an injunction; but had the treasurer proceeded to distrain and had the plaintiff in error sought to enjoin proceedings it is clear that the latter would have had no standing in a court of equity.

Judgment affirmed.

(To appear in 45 Ohio St.)

39 COLUMBUS, OHIO, *June 1st*, 1888.

I hereby certify that the foregoing is a full and true copy of the decision and opinion of the supreme court of Ohio delivered in the case of Shotwell *v.* Moore, taken from the original in my possession.

GEO. B. OKEY,
Reporter Supreme Court of Ohio.

40 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Stewart B. Shotwell and Samuel A. Moore, as treasurer of Harrison county, Ohio, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the laws of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said Stewart B. Shotwell, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the
41 laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice of the said Supreme Court, the 5th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

Allowed by me, with a supersedeas.

SELWYN N. OWEN,
Chief Justice of the Supreme Court of the State of Ohio.

STATE OF OHIO, }
City of Columbus, } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error directed to us we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named, in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

In witness whereof I, Urban H. Hester, clerk of the supreme court

of Ohio, have set my hand and seal of said court this 12th day of June, A. D. 1888.

[Seal of the Supreme Court of the State of Ohio.]

URBAN H. HESTER, *Clerk.*

42 [Endorsed:] Stewart B. Shotwell *vs.* Samuel A. Moore, treasurer of Harrison county, Ohio. Writ of error.

43 UNITED STATES OF AMERICA, *ss:*

To Samuel A. Moore, as treasurer of Harrison county, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein Stewart B. Shotwell is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Selwyn N. Owen, chief justice of the said supreme court of the State of Ohio, this 5th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

SELWYN N. OWEN,
Chief Justice of the Supreme Court of the State of Ohio.

STATE OF OHIO, }
Harrison County, } *ss:*

On this 8th day of June, A. D. 1888, personally appeared before me W. G. Estep, who, being duly sworn, deposes and says that on the 8th day of June, A. D. 1888, he delivered personally to said Samuel A. Moore, treasurer of Harrison county, Ohio, defendant herein, a true copy of this writ.

[Notarial Seal, Harrison County, Ohio.]

JAMES MOORE,
Notary Public in & for said State & County.

My fees, paid by S. B. Shotwell, $0.75.

44 [Endorsed:] Stewart B. Shotwell *vs.* Samuel A. Moore, treasurer of Harrison county, Ohio. Citation.

45 Supreme Court of the United States.

Know all men by these presents that we, Stewart B. Shotwell, D. B. Welch, and M. J. Brown, are held and firmly bound unto Samuel A. Moore, as treasurer of Harrison county, Ohio, and his successors in said office in the sum of five thousand dollars, to be paid unto him and his successors in said office; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals (in duplicate) and dated this 8 day of June, A. D. 1888.

Whereas the above-named Stewart B. Shotwell hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Ohio in an action pending therein, wherein the said Stewart B. Shotwell was plaintiff in error and the said Samuel A. Moore, as treasurer of Harrison county, Ohio, was defendant in error:

Now, therefore, the condition of this obligation is such that if the above-named Stewart B. Shotwell shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force.

STEWART B. SHOTWELL. [SEAL.]
D. B. WELCH. [SEAL.]
M. J. BROWN. [SEAL.]

Sealed & delivered in presence of—
AMON LEMMON.
JAMES MOORE.

Approved by me—

SELWYN N. OWEN,
Chief Justice of the Supreme Court of Ohio.

46 STATE OF OHIO, } *ss:*
City of Columbus, }

I, Urban H. Hester, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true copy of the original supersedeas bond now on file in my office.

Witness my hand and seal of said court, at Columbus, Ohio, this 20th day of June, 1888.

[Seal of the Supreme Court of the State of Ohio.]

URBAN H. HESTER, *Clerk*,
By HORACE M. CROW, *Deputy*.

47 [Endorsed:] Stewart B. Shotwell *v.* Samuel A. Moore, treasurer of Harrison county, Ohio. Supersedeas bond. Copy.

48 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-eight.

STEWART B. SHOTWELL, Plaintiff in Error,
vs.
SAMUEL A. MOORE, as Treasurer of Harrison County, Ohio,
Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Stewart B.

Shotwell, by Richard A. Harrison, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that subdivision 16 of section 2737 of the Revised Statutes of the State of Ohio, passed June 20, 1879, to take effect on the 1st day of January, 1880, is not in violation of nor repugnant to section 3701 of the Revised Statutes of the United States in either of the particulars it was claimed to be so by said plaintiff in error.

Said supreme court of the State of Ohio erred in deciding and adjudging that said subdivision 16 of said section 2737 of the Revised Statutes of Ohio was and is valid and binding upon said plaintiff in error.

And the said Stewart B. Shotwell prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed,
49 annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

RICHARD A. HARRISON,
Attorney for Plaintiff in Error.

50 [Endorsed:] U. S. Supreme Court. Stewart B. Shotwell *vs.* Samuel A. Moore, treasurer, &c. Assignment of errors.

Endorsed on cover: Ohio supreme court. No. 1030. Stewart B. Shotwell, plaintiff in error, *vs.* Samuel A. Moore, as treasurer of Harrison county, Ohio. Filed June 29, 1888.

1030

SUPREME COURT OF THE UNITED STATES.

STEWART B. SHOTWELL, *Plaintiff in Error,*

vs.

SAMUEL A. MOORE, TREASURER OF HARRISON COUNTY, OHIO, *Defendant in Error.*

MOTION TO ADVANCE CAUSE ON GENERAL DOCKET.

D. A. HOLLINGSWORTH.
JOHN M. GARVEN,
Prosecuting Attorney Harrison County.
DAVID K. WATSON,
Attorney-General of Ohio.

SUPREME COURT OF THE UNITED STATES.

STEWART B. SHOTWELL, *Plaintiff in Error,*

vs.

SAMUEL A. MOORE, TREASURER OF HARRISON COUNTY, OHIO, *Defendant in Error.*

MOTION TO ADVANCE CAUSE ON GENERAL DOCKET.

Defendant in error, Samuel A. Moore, as Treasurer of Harrison county, Ohio, moves this Honorable Court, that the above cause be taken out of its regular order on the docket, and set for hearing at an early date, for the following reasons, to wit:

1. The defendant in error is Treasurer of Harrison county, Ohio, and claims the right as such treasurer to collect certain taxes assessed under the revenue laws of the State of Ohio, but his right to do so is denied and resisted by the plaintiff in error, Stewart B. Shotwell, upon the ground that the Statutes of the State

of Ohio, under which he is proceeding to collect said taxes, are in conflict with Section 3701 of the Revised Statutes of the United States, providing against the taxation of the securities of the General Government by State or municipal authorities.

2. The questions involved are of such importance to the due administration of the revenue laws of the State of Ohio, that the Governor of the State (in pursuance of the Statute to that effect) has requested the Attorney-General to assist the regular counsel for the defendant in error in this action.

3. By reason of the pendency of this cause in this Court, and the uncertainty of the result, the operations of the State of Ohio in the assessment and collection of necessary taxes, and in the enforcement of its revenue laws, are seriously embarrassed in the following respect, that other citizens and tax-payers of the State, taking advantage of this uncertainty, refuse and neglect to list or make known similar property for taxation until the validity of the Statute in question shall be finally adjudicated by this Court.

4. Other suits of the same character are pending in the courts of Ohio, all of which will be disposed of by the decision of this Court in this cause.

5. The time is near at hand when, by the laws of the State of Ohio, to wit, the second Monday of April, 1889, the personal property of the State must be an-

nually listed for taxation, and it is of great public importance to the State, and the citizens and tax-payers thereof, that the questions involved in this cause shall be determined by this Court, so that the respective rights of the State and the citizens thereof under the revenue laws of the State shall be definitely settled and known before the above date.

The questions presented by the record are—

(*a*) Is the Statute of Ohio (Section 2737, Vol. I, Revised Statutes), which requires the "monthly average amount or value, for the time he held or controlled the same within the preceding year, of all moneys, credits, or other effects, within that time invested in or converted into bonds or other securities of the United States, to the extent he may hold or control such bonds or securities on the day preceding the second Monday of April," to be listed for taxation by the holder or controller thereof on that day, in conflict with any valid provision of the laws of the United States, or the Constitution of the United States?

(*b*) Is the method provided in Section 2737 of the Revised Statutes of Ohio, for listing for taxation the property so invested or converted into securities of the United States, in conflict with Section 12, Aricle 2, of the Constitution of the State of Ohio, which requires that property, moneys, credits, investments in bonds, stocks, etc., shall be taxed by "a uniform rule"?

(*c*) Did the act of plaintiff in error, as shown by the record, in converting his current bank deposits into "greenbacks," and holding them as such on the day preceding the second Monday of April, in each of the years for which taxes were charged thereon by the County Auditor, operate to relieve the plaintiff in error from the payment of the usual State taxes on bank deposits, or was this a mere shift or device to evade the law, and which courts of justice do not recognize?

Respectfully submitted.

D. A. HOLLINGSWORTH.
JOHN M. GARVEN,
Prosecuting Attorney Harrison County.
DAVID K. WATSON,
Attorney-General of Ohio.

Service of notice of the hearing of the above motion is hereby acknowledged.

RICHARD A. HARRISON,
Attorney for Plaintiff in Error.

COLUMBUS, O., *November* 30, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D 1888.

Stewart B. Shotwell, Plaintiff in Error.

vs.

Samuel A. Moore as Treasurer of Harrison County, State of Ohio.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Sections 2736, 2737, 2746, 2747, and 2781, of the Revised Statutes of Ohio, provide as follows:

"SEC. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or, within ten days thereafter, make out and deliver to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, *on the day preceding the second Monday of April of that year*, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise."

"SEC. 2737. Such statement shall truly and distinctly set forth, *first*, the number of horses, and the value thereof; *second*, the number of neat cattle, and the value thereof; *third*,

the number of mules and asses, and the value thereof; *fourth*, the number of sheep, and the value thereof; *fifth*, the number of hogs, and the value thereof; *sixth*, the number of pleasure carriages (of whatever kind), and the value thereof; *seventh*, the total value of all articles of personal property, not included in the preceding or succeeding classes; *eighth*, the number of watches, and the value thereof; *ninth*, the number of piano fortes and organs, and the value thereof; *tenth*, the average value of the goods and merchandise, which such person is re-required to list as a merchant; *eleventh*, the value of the property which such person is required to list as a banker, broker, or stock-jobber; *twelfth*, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; *thirteenth*, moneys on hand or on deposit subject to order; *fourteenth*, the amount of credits as hereinbefore defined; *fifteenth*, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; *sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities* ON SAID DAY PRECEDING THE SECOND MONDAY OF APRIL; *and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section;* but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items."

SEC. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

SEC. 2747. The listing of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies,

or otherwise, shall be made between the second Monday of April and the third Monday of May, annually; and the assessor shall, on or before the first Monday of May, annually, leave with each person, resident in his township or ward, of full age, and not a married woman, or insane person, or at the office, usual place of residence or business of each person, a written or printed notice, requiring such person to make out for the assessor a statement of the property which, by law, he is required to list, accompanied with printed forms, in blank, of the statement required; and the assessor shall, at the time he delivers such notice and blank forms, demand and receive such statement, unless such person shall require further time to make out the same, in which case he shall call for the same before the third Monday of May."

"SEC. 2781. If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or to the county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain, as near as practicable, the true amount of personal property, moneys, credits, and investments, that such person ought to have returned or listed, to which amount he shall add fifty per centum, and place the same on the tax list; and the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and corrections are made, but as to former years, no penalty shall be added, and only simple taxes shall be claimed."

"SEC. 1042. The auditor shall, annually, on or before the first day of October, deliver to the county treasurer a true copy or duplicate of the book containing the tax list required to be made by him for the year."

"SEC. 1091. Each person charged with taxes on a tax duplicate, in the hands of the county treasurer, may pay the full amount of such taxes on or before the twentieth day of Decembar, or one-half thereof on or before the twentieth day of June next ensuing; but all road taxes so charged, shall be paid prior to the twentieth day of December."

Sec. 3701 of the Revised Statutes of the United States is in the following words:

"Sec. 3701. All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." U. S. Rev. St., p. 736.

On the Saturday preceding the second Monday of April in the years 1881, 1882, 1883, 1884, and 1885, the plaintiff in error had on deposit in bank at the town of Cadiz, Harrison County, Ohio, to his credit as a general depositor, certain sums of money; and on said Saturday of each of said years he checked out the balance so standing to his credit, and at his request the same was paid to him in United States securities, commonly called "Greenbacks," and he thereby became *bona fide* the absolute owner of the money so withdrawn, and was the owner thereof on the day preceding the second Monday of April in each of said years.

Believing that the obligations of the United States so held and owned by him, and the moneys he had invested in, or converted into such obligations were exempt from taxation, under said section 3701 of the Revised Statutes of the United States, he did not return the obligations nor the money for taxation. But the Auditor of said County, on February 19, 1886, placed said moneys on a special tax duplicate and charged the same for taxation for State, county, and other local purposes, against the plaintiff in error, and delivered the duplicate to the Ttreasurer of said county for collection. The amount so charged was $2,324.89, which the plaintiff in error declined to pay.

Thereupon the Treasurer commenced a civil action

against him in the Court of Common pleas of said county, by filing a petition in the form prescribed by the code of civil procedure of said state; the prayer of which was for a personal judgment in favor of the Treasurer against the plaintiff in error for the amount of said taxes and interest thereon from February 19, 1886. An answer to this petition and a reply to the answer were filed, and thus the issues in the action were joined.

It is not necessary to state the allegations of these pleadings, inasmuch as the action was submitted to the trial Court without the intervention of a jury, and the Court, under section 5205 of the Ohio Code, found and stated in writing its conclusions of fact separately from its conclusions of law; and, under the Ohio Code, these findings of fact are conclusive between the parties, and upon them arise the questions of law presented by the record.

These conclusions of fact are as follows:

"That the defendant is, and for many years has been, a resident of Harrison County, Ohio. That on the Saturday preceding the second Monday in April in the year 1881, 1882, 1883, 1884, and 1885 the defendant had on deposit in bank at the town of Cadiz, in said County, to his credit as a general depositor the following sums: In 1881, $30,900; in 1882, $26,900; in 1883, $29,550; in 1884, $18,560; in 1885, $4,700. That on said Saturday in each of said years he checked out the said balance so standing to his credit, and at his request the same was paid to him in United States securities, commonly called "Greenbacks." That on each occasion after counting the money so paid to him he enclosed the same in a package, wrote his name thereon, and return the same to the officer of the bank, requesting him to place the same in the bank's safe for him, which was done. On no occasion did the defendant carry the money out of the bank building. And in the early part of next week in each of

said years he returned to the bank and demanded his package which was given him, and he opened the same and delivered it to an officer of the bank, asking that the amount should be placed to his credit as a general depositor, which was done. That on each occasion the defendant drew out the balance due him, with intent, to obtain non-taxable securities, and *thereby* evade taxation on such balance; but that on each occasion during the time which intervened between the withdrawal and the subsequent deposit as a general depositor he was a *bona fide* the *absolute owner of the money so withdrawn*, and the same was subject to his disposal. That he did not in either of said years list for taxation any part of the money *so paid to him*, nor did he list the monthly average amount or value for the time he held or controlled the same within the preceding year any moneys, credits, or other effects within that time invested in or converted into the said securities so by him drawn out of bank, and that said monthly average *so invested* by the defendant in such securities within the years respectively preceding the drawing out of said moneys was the amount so drawn out at the end of the year. That the Auditor of said county placed said several sums upon the duplicate of said county for the year 1885, except for the year 1885 he erroneously placed $4,949 with fifty per cent. added thereto, making $7,420, whereas the data before him, and by which he should have been controlled authorized only $4,700, which with fifty per cent. added would make $7,050. And the Court further finds that the amount of taxes chargeable upon the aggregate of said several sums, if the same are subject to taxation, is $2,317.05, and that said duplicate was delivered to the Treasurer of said County for collection." (Printed record, 6, 7.)

Upon the foregoing conclusions of fact, the Court rendered the following judgment:

"And the Court being of opinion that upon the facts so found the law of this case is with the defendant, it is thereupon considered that the defendant recover of the plaintiff his costs herein expended, taxed at $20.60." (Printed record, 7, 8.)

(In *Levi* vs. *Daniels*, 22 Ohio St., 38, the Supreme Court of Ohio held:

"Where the Court, being requested to state separately its conclusions of law and fact, makes a sufficient finding of the facts, and renders a final judgment thereon, the judgment itself is to be regarded as a statement of the Courts conclusion of law, within the meaning of the code.")

The Treasurer thereupon filed a petition in error in the Circuit Court of Harrison County against Shotwell, assigning that the Court of Common Pleas erred in its conclusion of law from the facts found, and praying that said judgment might be reversed, and the Treasurer restored to all things he had lost by reason thereof. The Circuit Court reversed the judgment, and then proceeded, under authority conferred by section 6726 of the Code of Civil Procedure of Ohio, to render the judgment which, in the opinion of that court, the Court of Common Pleas ought to have rendered upon the aforesaid facts found by that court; namely, a judgment that the Treasurer recover of Shotwell the sum of $2,422.07, debt, and also $20.60 costs in the trial court, and also the costs on error.

Afterward, the plaintiff in error filed a petition in error in the Supreme Court of Ohio against the defendant in error, assigning for error that the Circuit Court erred in reversing the judgment of the Court of Common Pleas, and in rendering judgment against the plaintiff in error. This cause was heard, and a judgment rendered affirming said judgment of the Circuit Court, with costs; and in the entry of the judgment, the Court certified, in substance, that in the rendition of said judgment of affirmance, it was material to the case to determine whether subdivision

16 of said section 2737, Revised Statutes of Ohio, is in violation of, and repugnant to, said section 3701, Revised Statutes of United States, and was of binding force against the plaintiff in error, etc.; the Court, in rendering said judgment of affirmance, having decided that said subdivision is not in violation of, nor repugnant to, said section 3701, as claimed by the plaintiff in error.

The general question, then, before this Court is: Was the plaintiff in error required by the law of the land to list for taxation the obligations which the record shows were owned by him *bona fide* and absolutely at the times therein stated, or, what would have been the same thing, to list for taxation the amount of the credits which he converted into said obligations?

The particular inquiry is: Does subdivision 16 of section 2747 of the Revised Statutes of Ohio contravene section 3701 of the Revised Statutes of the United States?

Said subdivision provides that each person required to list property for taxation in the State of Ohio, shall include in his return, "The monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on the day preceding the second Monday of April."

This provision assumes to tax the means put into obligations of the United States. It is, therefore, as repugnant to the Act of Congress exempting such obligations from taxation under State authority, as it would have been had it in terms provided for the taxation of the obligations outright.

The provision is an indirect tax upon the obligations of the United States.

Every one knows that the very fact that such obligations are non-taxable, constitutes one of the main inducements to convert taxable property or effects into such obligations, and thereby free the owner of them from taxation upon the means converted into or invested in them.

And it is self-evident that such obligations need not be owned for more than a year in order to entitle the owner of them to all the benefits and advantages of their ownership, including their exemption from taxation. Every person has a right to acquire them when he pleases, and dispose of them at his pleasure; and his rights as such owner, during the time he may own them, in no wise depends upon the length of the time he may own them.

To hold that such securities must be owned by the person acquiring them for more than a year in order to entitle him to the full benefit of the act of Congress exempting them from taxation, would, in a measure, defeat the object of the exemption. But by the provisions of the Revised Statutes of Ohio, upon which the defendent in error must rely to sustain the judgment of the Court below, an attempt is made to evade the act of Congress by levying a retrospective tax

upon the moneys, credits, or other effects invested in or converted into such non-taxable obligations. Under the decision of this Court this is inadmissible.

The fact that the Ohio enactment limits the tax upon the means invested in or converted into obligations of the United States, to the monthly average amount or value of such means for the time the same were held or controlled, within the preceding year, by the person making the investment or conversion, does not remove the objection to the validity of the enactment, for the reason that taxation, in that mode, of investments in securities of the United States, deprives the investor of the full benefit and advantage of the act of Congress exempting them wholly from taxation, either directly or indirectly. For example, in January last a citizen of Ohio invested $5,000 in United States 4% bonds. He paid a premium of 25% on their par value. The provision exempting them from taxation affected their value in the market, and increased the price which he was compelled to pay for them, and he purchased them because they are exempt from taxation. Now, three months afterward, on the day preceding the second Monday in April, he is required to return his taxable property for taxation during the year *next after* such Monday. The Ohio statute provides that he shall return for taxation, *during the ensuing year*, the monthly average amount or value during the nine months preceding the first of January, the means which he on that day converted into such obligations. If he can be required to do so, then he will be taxed for the *ensuing* year upon the amount of three-fourths of the means converted into such obligations. It is, we submit, evident

that an enactment that will have that effect will accomplish by indirection that which cannot be done directly.

According to the Ohio system of taxation, each person is required to return the taxable property owned by him on the day preceding the second Monday in April in each year, *for taxation during the ensuing year.* The tax is levied upon the property so returned for taxation. After the making of the return, the county auditor is required to levy the taxes upon the property returned for the "*current year*;" and one-half the taxes are payable by the 20th day of December of the year in which the return is made and the taxes are assessed, and the other half by the 20th day of June in the following year. Thus it is seen the taxes annually assessed are prospective, not retrospective; and the levy is a yearly levy, and is made upon property owned by the tax-payer on the day preceding the second Monday of April in each year. The yearly levy for the tax exhausts the power for the year. Cooley on Taxation, 256; *Otis* v. *City of Boston*, 12 Cush. 44, 48.

It follows that when a tax is assessed, upon property subject to taxation, for the year following the day preceding the second Monday of April of a given year, such property and the owner of it is entirely free and discharged from all liability to be taxed upon any other property during the ensuing year. If he loses any of his property or effects in speculation or ortherwise, or converts the same into or invests it in non-taxable securities, on any day during that year, it cannot be subjected to taxation for the year next

after that year. But if a citizen of Ohio during the year following that in which he has returned the taxable property owned by him on the day preceding the second Monday of April, for taxation during such year, invest a portion of his means in obligations of the United States, and he is the owner of them on the day preceding the second Monday of April in the *following* year, he will, if he can be required to return for taxation, for such following year, the monthly average or value of such means during such part of the preceding year as he owned the same, be thereby taxed, indirectly, upon the obligations into which he converted such portion of his means. He was induced to make the conversion because such obligations are exempt from taxation; but if he is compelled to pay a tax upon the means so converted, he loses, at least to the extent of such tax, the benefit of the exemption. *To tax the means put into the obligation is, in effect, to tax the security.*

The change of property, credits, or money, into obligations of the United States, is not a fraud upon the revenue. The sum represented by such obligations, or a larger sum than is represented by their face, is turned over to the person from whom they are acquired, who is bound in law to pay taxes on that sum. It is not withdrawn from taxation. There is a simple change of the ownership of the money, property, or effects, which remain subject to taxation as fully as if the same had not been converted into national securities.

Ogden, Treasurer, vs. *Walker*, 59 Ind, 460.

That case arose under an act of the General Assembly of the State of Indiana, entitled, "An Act to

provide for a uniform assessment of property, and for the collection and return of taxes thereon," approved December 21, 1872. Section 48, which is substantially the same as said section 2736 of the Revised Statutes of Ohio, provides that every person required by the act to make or deliver a statement or schedule of his property for taxation, "shall set forth an account of the property held and owned by him," in accordance with the form of such schedule, contained in section 49 of said act. The eighth item of said schedule is as follows:

	For purpose of taxation owned or held on the first day of April.	
8. Monthly average value of money, credits, or other personal property converted by me into bonds or other securities of the United States, while held or controlled by me, during the year ending April 1, without deducting any indebtedness created by such investment.	DOLLARS.	CENTS.

1 Revised Statutes of Indiana, year 1876, pp. 81, 82.

Prior to this enactment, the Supreme Court of Indiana, in the case of the *Board of Commissioners of Montgomery County* vs. *Elston*, 32 Ind., 27, held that treasury notes, commonly called "Greenbacks," were not liable to State taxation.

And at the November term, 1876, in the case of *Stillwell* vs. *Corwin*, 55 Ind., 433, the same Court held that where plaintiff deposited currency in a bank, and took from the bankers a writing, acknowleding the receipt of a certain sum equal to the deposit, in United States bonds, not taxable, and promising to return the same on demand, and an action was brought to recover the bonds, the contract was lawful and should be enforced, though made for

the express purpose of avoiding taxation on the deposit.

Finally, at the November term, 1877, in the case of *Ogden, Treasurer*, vs. *Walker*, 59 Ind., 460, the Court affirmed its former ruling, that United States treasury notes, commonly called "Greenbacks," are not subject to taxation; and held that so much of said section 49, 1 R. S. Ind., 1876, of said act of December 21, 1872, providing for "the assessment of property," as requires the listing commanded by the eighth item thereof, is inoperative and void.

The action in the Court below was brought to enjoin the collection of certain taxes. It appeared by the complaint, that the plaintiff owned, and had in his possession, on the 1st day of April, 1873, $5,681 in greenbacks. When the Assessor called upon him, he furnished a full and true list of his personal property, which was duly appraised by the Assessor at $944. The Assessor then called upon him for the amount of money on hand on April 1st, to which he replied, that he had no money on that day except greenbacks, which he was not, in his opinion, required to list. He offered however, to list she sum that he had, literally and truly, as "U. S. Treasury notes, commonly called greenbacks," but this the Assessor refused to accept, and himsilf listed for the plaintiff $4,446, and returned him as "refused to swear." Upon this the Auditor added fifty per cent. to the amount returned by the Assessor, and extended taxes upon the amount thus obtained. The plaintiff paid so much of the tax as had been, according to the assumption of the complaint, lawfully assessed against him, and sued to set aside the remainder of it. A demurrer was filed to

the complaint upon the ground that it was bad in substance. The demurrer was overruled, and judgement rendered as prayed for in the complaint, and an appeal taken to the Supreme Court. The Appellate Court affirmed the judgment.

In delivering the opinion of the Court, HOWK, J., stated stated the question for decision thus:

"We the appellee required by law to list for taxation the United States treasury notes, commonly called greenbacks, which were held by him on the 1st day of April, 1873?" And after referring to the case in 32 Ind., and the decision of the Supreme Court of the United States in the case of *Bank v. Superviser*, *supra*, in which it was held that these treasury notes were not liable to State taxation, and after referring to said act of December 21, 1872, and quoting sections 48 and 49, the learned judge proceeded as follows:

"It is claimed by appellant's counsel, that, by these provisions, 'it was the intention of the Legislature to tax United States treasury notes or greenbacks.' It is difficult to understand what was intended by the 8th item, above cited, of the schedule for taxation. In the form of the affidavit annexed to said shedule, the person listing his property for taxation is required to swear, among other things, that 'the monthly average amounts and value of moneys, credits, or other personal property converted by me into bonds, or other securities of the United States, and held or controlled by me during the year ending April 1st, and not deducting any indebtedness created by such investments, is as stated in the 8th paragraph of this schedule.

"It seems to us, from the provisions, that it was the Legislative intent to devise some method, if practicable, whereby bonds or other securities of the United States might be subjected to State and municipal taxation. In other words, we cannot construe the 8th item of the schedule before cited, and so much of the affidavit annexed to said schedule as we have quoted, as anything more than a mere attempt to accomplish by indirection what could not be done directly, namely, the taxation of bonds and other securities of the United States by State or municipal authority. It cannot

be doubted, we apprehend, that it is within the power of the government of the United States, as the supreme law-making power of this country, to provide by law for the exemption from State, municipal and other taxation the obligations of the United States."

Said section 3701 of the Revised Statutes of the United States, is then quoted in the opinion, whereupon it is further said:

"It seems to us that the provisions of this section are decisive of this case. The United States treasury notes, commonly called greenbacks, owned and held by the appellee, were by law 'exempt from taxation by or under State or municipal or local authority,' either directly or indirectly. The appellee had the legal right to refuse to list his greenbacks, or U. S. treasury notes, for the purposes of such taxation, and refuse to swear to a schedule after the assessor had inserted therein a certain sum of money, on account of his U. S. treasury notes or greenbacks.

"It seems clear to us that the eighth item of the schedule, in section 49 of the assessment law of this State, before referred to, and so much of the affidavit above quoted as is addressed to said eighth item, are in direct conflict with the spirit, meaning, and intention of said section 3701 of the Revised Statutes of the United States, and are, therefore, inoperative and of no effect."

Reference to the remainder of this opinion will be made further on, in another connection.

It is immaterial whether the tax is directly upon the obligations *eo nomine*, or is indirectly upon the obligations by levying it upon the means put into the obligations.

McCulloch vs. *The State of Maryland*, 4 Wheat., 316.
Bank of Commerce vs. *New York*, 2 Black, 620.
Bank Tax Case, 2 Wallace, 200.
Banks vs. *New York*, 7 Wallace, 16.
Weston vs. *City of Charleston*, 2 Pet., 449.
People ex rel. The Bank of New York vs. *Supervisors*, 7 Wallace, 26.
Ogden, Treasurer, vs. *Walker*, 59 Ind., 460.

In *The People ex rel.* vs. *Supervisors*, in which it was held that United States notes issued under the acts of February 25 and July 11, 1862, and March 3, 1863 (12 Sts., 345, 532, 709), although issued as currency, were yet national obligations, and exempt from State taxation, Chief Justice Chase, delivering the opinion of the Court, said:

"Forty years ago, in the case *Weston* vs. *Charleston*, 2 Pet., 467, this Court, speaking through Chief Justice MARSHALL, said:

'The American people have conferred the power of borrowing money upon their Government, and by making that Government Supreme, have shielded its action in the exercise of that power from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.'

"And, applying these principles, the Court proceeded to say:

'The right to tax the contract to any extent when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends upon the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which may rest them entirely.'

"And finally:

'A tax on government stock is thought by this Court to be a tax on the contract—a tax on the power to borrow money on the credit of the United States, and, consequently, repugnant to the Constitution.'

"Nothing need be added to this, except that in no case decided since have these propositions been retracted or qualified. The last cases in which the power of the States to tax obligations of the Government came directly in question, were those of *The Bank of Commerce* vs. *New York*, 2 Black, 628, in 1862, and the *Bank Tax Case*, 2 Wall., 200, in 1865, in both of which the power was denied." * * * *

"The principle of exemption is, that the States cannot control the National Government within the sphere of its constitutional powers — for there it is supreme — and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control.

"The certificates of indebtedness in the case before us are completely within the protection of this principle. For the public history and the acts of Congress show that they were issued to creditors for supplies necessary in to the Government in carrying on the recent war for the integrity of the Union and the preservation of our republican institutions. They were received instead of money at the time when full money payment for supplies was impossible, and according to the principles of the cases to which we have referred, are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued."

The Legislature of New York imposed taxes on banking capital as upon other real and personal property of individuals according to valuation.

In *Bank of Commerce* vs. *New York*, 2 Black, 628, this Court held that the bonds and other securities of the United States, included in such valuation, were not liable to be taxed by State authority. The Legislature of the same State subsequently provided for the taxation of the capital of banks by an arbitrary valuation; that is to say, by requiring the valuation for taxation to be equal to the sum of the capital paid in and secured to be paid in, without reference to its actual value at the time of valuation; and it was then insisted, in behalf of the State Commissioners of Taxes, that this was a tax on the franchise and not on property, and that no inquiry could be made, therefore, as to the component elements of the capital, with a view to ascertain whether any of them were exempt from taxation. But, in *Bank Tax case*, 2

Wall. 200, this Court held that the tax was *really* on the property of the bank, and could not be constitutionally assessed upon that part of it which consisted of national bonds and securities.

The plaintiff in error had a right to exchange money on deposit in bank to his credit for obligations of the United States, even if his express purpose in the transaction was to exchange money which was taxable for obligations which were not taxable.

The charge of an attempt to defraud the State of Indiana out of taxes, by such a transaction, was set up and insisted upon in the case of *Stillwell* vs. *Corwin*, 55 Ind., 435. Demurrers were filed to the answers in that case setting up the facts, and the demurers were sustained. The Court says:

"It is insisted by the appellants that the agreement set out in the first paragraph of the complaint was made for the purpose of avoiding the payment of taxes for the year 1866 on money on deposit in the Citizens' Bank, as alleged in the first paragraph of their answer, and, therefore, that it is fraudulent and void; and, also, that the agreement, for the same reason, is void, as being against public policy.

"We cannot perceive wherein the agreement is void for either cause. Any person has a right to exchange money on deposit in bank for bonds on the United States, at any time even if the express purpose in the transaction was to exchange money which was taxable for bonds which are not taxable. Nor would the destruction of the certificates of deposit make the slightest difference, for they would be canceled by the exchange. The money given for the bonds was taxable for the year 1886, either in the hands of the Stillwells or in the hands of Makepeace. The revenue, therefore, is not defrauded. And although no bonds actually passed in the transaction, yet if Makepeace choose to take the obligation of the Stillwells for the delivery of bonds, instead of the bonds themselves, it will not change the character of the transaction."

The above case was cited and approved in the case of *People ex rel.* vs. *Ryan*, 88 N. Y. 142, in which it was *held:*

"Where one makes affidavit that his indebtedness exceeds his taxable personal property, and it appears that part of such indebtedness is a demand note for $25,000, the proceeds of which were used to purchase government bonds which were pledged as collateral thereto, and it does not appear that the note is not a just debt, the assessors must allow a deduction therefor, although the transaction may have been a device to escape taxation."

DANFORTH, J., announcing the opinion of the Court, says: "The respondent is entitled to judgment, and so he would be, although the transaction of which the $25,000 note formed a part was, as the learned counsel for the appellant says, 'a device to escape assessment and taxation.' *Stillwell* vs. *Corwin*, 55 Ind., 433. We are referred to no statute which prohibits a property owner from choosing between the embarassment of a debt and a submission to a burden, justly indeed imposed on all, and which, if he escapes, must altegether fall upon his neighbors.

"The assessors therefore exceeded their necessary duty, when, by inquisition, they so press the relator as to call from him a disavowal of that purpose, and his innocence of intention to circumvent 'the tax laws.' The argument of the appellants is in effect to show that this was an ingenious falsehood. It touches, however, not the fact of an indebtedness, but the motive which led to its creation. The statute concerns itself only with the debt. It makes the 'taxable personal property' of an individual, so much only of that species of his estate as remains 'after deducting the just debts owing by him.' R. S., pt. 1, chap. 13, tit. 2, art. 2, § 9, subd. 4, p. 391.

In view of this provision the assessors erred; for there is not a word of evidence to indicate that the debt of $25,000 was not in every legal sense a just one, and enforceable against the relator in the same manner as other debts contracted by him. That the property purchased with its proceeds stands as security for its payment and is itself nontaxable, cannot alter the result. This attribute of exemption was

impressed upon it to promote its salability, and no doubt entered into and enhanced the price paid.

"Nor do we perceive how, by a purchase in the manner narrated in the return, the buyer evades our law of taxation. The law does not prohibit it, therefore does not apply, and in such a case there can be no evasion, *Smale* vs. *Burr*, L. R., 8 C. P., 64. Whether the law shall be so extended as to prevent similar transactions is for the legislature to determine."

In *Thayer vs. Boston*, 124 Mass., 132, it was *held*, that if a taxpayer has actually changed his domicile, he cannot afterward be lawfully assessed in the place from which he has removed, although his removal was for the purpose of avoiding or lessening the taxation of his property.

The judge, in the trial court, among other things, instructed the jury as follows:

"The fact that any man changes his home or his domicile for the purpose of avoiding, or escaping, or lessening his taxes, is of no consequence whatever. If he does with an honest intention, and really and actually change his home, the motive with which he does it is of no consequence."

A removal may be made so as to escape a subsequent tax. *Savary vs. Georgetown*, 12 Metc., 178.

The finding of the trial court, "That on each occasion the defendant drew out the balance due him with intent to obtain non-taxable securities and *thereby* evade taxation on such balance," evidently means that the defendant, in order to lessen the amount of his taxable property, converted the indebtness of the bank to him into non-taxable obligations of the United States. That is to say, he requested the bank to pay its indebtness to him in obligations of the United States; with which request the bank complied. He had a right to make the request, and the bank had a right to comply with it.

It is true, opposing counsel in court below contended that "the greenbacks continued in the bank, and might properly be said, in the language of section

2737, Revised Statutes of Ohio, to be moneys on deposit subject to order." But this statement utterly ignores the facts found by the trial court. That court found "that on each occasion during the time which intervened between the withdrawal and the subsequent deposit as a general depositor, he (Shotwell) was *bona fide* the absolute owner of the money so withdrawn, and the same was subject to his disposal." This finding of fact is conclusive as to the *bona fide*, absolute ownership of the money withdrawn by Shotwell from the bank during the time mentioned in the finding. The Circuit Court and the Supreme Court of the State, in reviewing the judgment of the Common Pleas, were each conclusively bound by this finding, and in this court it is in like manner conclusive. According to the finding, if the bank, after the plaintiff in error had placed his greenbacks in the safe of the bank solely for safe-keeping therein, had converted them to their own use, he could have maintained an action of trover therefor against the bank. Upon his checking out the balance standing to his credit as a general depositor of the bank, the bank ceased to be his debtor, and he had no moneys on deposit as a general depositor subject to his order; and the bank held nothing of his except the greenbacks which he had placed in the vault or safe of the bank for safe-keeping as his property, and which the Common Pleas found was *bona fide* his absolute property.

The case of *Mitchell* vs. *Leavenworth County Commissiomers*, 91 U. S., 206, is not in point. The decision was simply, that if, for the purpose of evading ing a State tax, a person change his investment to United States notes, a day before the day on which

property is to be listed for taxation, and two days afterwards changes back again, a *court of equity* will not, *by injunction*, interfere to prevent a levy of a tax assessed regardless of such change, *but will leave him to his legal remedy*, notwithstanding the exemption of such notes from State taxation.

One of the cases cited by the Chief Justice shows the basis of the decision. That case is *Albany City National Bank* vs. *Maher*, 19 Blatchf., 182, which was a suit by a National Bank for an injunction to restrain the defendant as Receiver of Taxes of the city of Albany from all proceedings to collect a tax assessed against various stockholders of the bank by the Board of Assessors of the city of Albany. The Court held that the assessment against the shareholders of the complainant was not merely invalid for irregularity, but void because the assessors failed to observe a condition precedent to their right to assess, and that this conclusion must result in granting the injunction asked for. But the Court said:

"In order, however, that there may be no misapprehension as to the views which lead to this result, it is proper to say, that the right of the complainant to the relief stands on a very different footing from that of the several stockholders who have been assessed. If these stockholders were complainants, there would be two sufficient reasons for denying them the aid of a court of equity and the preventive remedy of an injunction. Courts of equity are always reluctant to interfere with the collection of State taxes by the officers intrusted with that duty, and have almost uniformly refused to do so when the case made rests solely on the illegality of the tax. As is ruled in *Dows* vs. *City of Chicago*, (11 Wall., 108) 'there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of

suits or produce irreparable injury,' etc. Upon this consideration, the stockholders would not be entitled to an injunction.

"But there is another ground upon which such relief would be refused them. In dealing with the rights of parties to resist taxation, courts of equity proceed upon considerations quite unknown to courts of law, and hold, not only that it must appear that the tax is one unlawfully imposed, but, also, one that justice and good conscience does not require the party to pay. An illustration in point is found in *Mitchell* vs. *Commissioners of Leavenworth*, (91 U. S., 206) where a complainant had converted his cash on deposit into United States notes before the day of listing taxes, in order to escape taxation, and, being taxed notwithstanding, the Court held, that, although the tax was illegal, it would not, while sitting as a court of equity, use its extraordinary powers to assist him in a scheme to escape taxation, and dismissed the bill."

The Court then say:

"If the stockholders of the bank were seeking aid in equity because the assessors failed to give them the notice of assessment required by law, they would be defeated, upon the ground that, as they were not in fact mislead, and not unjustly assessed, they should be held to their strict legal rights, and not entitled to the intervention of the court of equity. They would, therefore, be relegated to their remedy at law. * * *

"But," the Court said, "the rights of the complainant rest upon another footing. It is required, as has been stated, to withhold dividends from its shareholders to such extent as may be necessary to pay any taxes assessed against them. Some of its shareholders appeared before the Board of Assessors and were relieved from assessment. Many other shareholders did not attempt to be relieved, but now fall back upon their rights to insist that the tax is illegal, and refused to permit the complainant to retain their dividends. The complainant is thus exposed to a multiplicity of suits by these stockholders. * * * The case, therefore, is one where the Court must interfere, to prevent a multiplicity of suits."

In *Greene vs. Mumford*, 5 R. I., 472, the subject was thoroughly discussed, and the Court refused to interfere, on the ground that, if the tax was illegal,

the party had a remedy at law which was sufficiently adequate and far more consonant with the scope and provisions of the tax act. The English courts of equity, to which our ancestors were subject, and from which the American usage and practice is mainly derived, do not appear to have exercised jurisdiction in such cases.

In *Kellogg vs. Ely*, 15 Ohio St. 64, the Court refused to enjoin all illegal assessment, and "left the plaintiff to his remedy at law."

The original action against the plaintiff in error was an action at law for the recovery of a personal judgment for money only; it was an action of debt. The defence controverted the alleged indebtedness. The question in the case was, therefore, one of *legal* right and *legal* liability. Hence, Mitchell's case has no application to the case in hand.

The plaintiff in error had a legal right to acquire the United States notes of which the Court of Common Pleas found he was the *bona fide* absolute owner. The motive with which he acquired them, is of no consequence. The fact that his motive was to get rid of taxation on the money which he converted into such notes, is immaterial. For, "any person has a right to exchange money on deposit in a bank for bonds on the United States, at any time, even if the express purpose in the transaction was to exchange money which was taxable, for bonds which were not taxable." *Stillwell* vs. *Corwin*, (*supra.*) It follows that *in an action at law*, the motive of the person making the exchange cannot be inquired into.

The prayer in the answer in the original action, that the Treasurer be enjoined from collecting, or attempting to collect, the amount charged against him on the special duplicate, did not alter the nature of the cause of action upon which the Treasurer demanded, and in the Circuit Court recovered, a personal judgment. The action was an action of debt in which an issue of fact was joined, and which, at common law, was of right triable by jury. The Constitution of Ohio provides that "the right of trial by jury shall be inviolate," and under the laws of Ohio the issue upon which the Circuit Court rendered the the judgment, affirmed by the Supreme Court, was one which either party could demand should be tried by jury. Had the Treasurer undertaken to distrain, and had the plaintiff in error sought to enjoin the proceedings, the Treasurer could have raised the objection that a court of equity would not use its extraordinary powers in behalf of the plaintiff. But no such question arises in the case at hand. If the tax be illegal, that fact is, at law, a complete defence.

Opposing counsel suggested in the court below that the wisdom of said 16th sub-divison of section 2737 may be shown by a single illustration thus:

"A owns $100,000, safely invested in seven and eight per cent. mortgages, and is not in debt. Such investments is taxable at its actual value in money, but on the day preceding the day on which taxes are assessdd, he telegraphs to New York and purchases on credit a corresponding amount of non-taxable securities. His debits and credits on the next day exactly equal each other, and he therefore makes no return of credits to the Assessor. Having his securities in New York for the one day, he instructs his broker to resell them and pay off his

New York debt, and in this manner he has escapted liability for taxes to the amount of from two to three thousand dollars, according to the tax rate at the place of his domicile."

This is a singular "illustration" in view of the fact that the constitution of this State prohibits debts of the taxpayers from being deducted from the value of his credits; this being inconsistent with the requirement that *all* property, moneys and credits shall be taxed. Section 2, Article XII.

In *Exchange Bank of Columbus* vs. *Hines, Treas.*, 3 Ohio St., 1, it was decided that the tenth section of the tax law of 1853, which allowed individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their moneys and credits, is repugant to the constitution of Ohio, and is void; that the constitution permits no deduction of liabilities from moneys and credits.

The decision in that case has been approved and followed in several subsequent cases:

Lattimer, et al. vs. *Morgan et al.*, 6 Ohio St., 280.
Champaign County Bank vs. *Smith*, 7 Ohio St., 42 57.
Payne vs. *Watterson, Treasurer*, 37 Ohio St., 121, 125.

Respectfully submitted,

RICHARD A. HARRISON,
T. D. LINCOLN.

Office Supreme Court, U. S.
FILED
JAN 26 1909
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

STEWART B. SHOTWELL, *Plaintiff in Error,*

vs.

SAMUEL A. MOORE, AS TREASURER OF HARRISON COUNTY, OHIO, *Defendant in Error.*

BRIEF FOR DEFENDENT IN ERROR.

STATEMENT OF THE CASE, WITH EXTRACTS FROM THE LAWS OF OHIO BEARING UPON THE ISSUE.

D. A. HOLLINGSWORTH.
JOHN M. GARVEN,
County Solicitor, Harrison County.
DAVID K. WATSON,
Attorney-General of Ohio.

SUPREME COURT OF THE UNITED STATES.

STEWART B. SHOTWELL, *Plaintiff in Error,*

vs.

SAMUEL A. MOORE, AS TREASURER OF HARRISON COUNTY, OHIO, *Defendant in Error.*

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OF THE CASE, WITH EXTRACTS FROM THE LAWS OF OHIO BEARING UPON THE ISSUE.

STATE CONSTITUTION.

SECTION 2, ARTICLE 12. "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and all real and personal property, according to its true value in money."

REVISED STATUTES OF OHIO.

SECTION 2730. "In this title (taxation) the * * * term 'money,' or 'moneys' shall be held to mean and include any surplus or undivided profits held by societies for savings

or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand; the term 'credits,' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona-fide debts owing by such person; but in making up the sum of such debts owing, there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint-stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid."

SEC. 2731. "All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property, as prescribed in this titlle * * *."

SEC. 2734 "Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all money invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company, or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county * * *."

SEC. 2736. "Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within ten days thereafter, make out and deliver to the assessor a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, annuities, or otherwise, in his possession or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise * * *."

SEC. 2737. "Such statement shall truly and distinctly set forth, * * * * * * * * * thirteenth, moneys on hand, or

on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; * * sixteenth, *the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April;* and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section * * *."

SEC. 2781. "If any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or to the county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain, as near as practicable, the true amount of personal property, moneys, credits, and investments, that such person ought to have returned or listed, to which amount he shall add fifty per centum, and place the same on the tax list; and the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the years in which the inquiries and corrections are made, but as to former years, no penalty shall be added, and only simple taxes shall be claimed."

In accordance with the foregoing provisions of the constitution and laws of the State of Ohio, the county auditor of Harrison county, in February, 1886, undertook to correct the tax returns of the plaintiff in error for the years 1881, 1882, 1883, 1884, and 1885, and did place against him, on the tax lists of the county, the amount of taxes now in con-

troversy. On refusal to pay, the county treasurer, whose duty it was to collect the same, brought suit in the Common Pleas Court of the State, to recover the amount, and to this proceeding the plaintiff, defendant below, made answer claiming substantially that the property, on which it was sought to charge him with taxes, consisted of United States obligations, commonly called "greenbacks," and that they were non-taxable. There was no question as to the regularity of the action of the county auditor, or the other tax officials, except as it is claimed that the property itself was not a proper subject of taxation.

The defendant also, treating his answer as a cross-petition, asked that the treasurer be "enjoined from collecting or attempting to collect" the tax so assessed against him.

On the trial the Court, at the request of the parties, made a special finding of facts, as follows:

"October 1st, '86. Term Time. The parties to this cause having waived a jury, the same came on for trial to the Court, and the parties, with a view of excepting to the decision of the Court upon the questions of the law involved in the trial, having requested the Court to state in writing the conclusions of fact found separately from the conclusions of law, and the testimony having been heard, the Court finds as conclusions of fact as follows:

"That the defendant is, and for many years has been, a resident of Harrison county, Ohio. That on the Saturday preceding the second Monday of April in the years '1881, '82, '83, '84 and '85 the defendant had on depost in bank at the town of Cadiz, in said county, to his credit as a general

depositor the following sums: in '81, $30,900; in '82, $26,900; in '83, $29,550; in '84, $18,560; in '85, $4,700. That on said Saturday in each of said years he checked out the said balance so standing to his credit, and at his request the same was paid to him in United States securities, commonly called 'Greenbacks.' That on each occasion after counting the money so paid to him he enclosed the same in a package, wrote his name thereon, and returned the same to the officer of the bank, requesting him to place the same in the bank's safe for him, which was done. On no occasion did the defendant carry the money out of the bank building. And in the early part of the next week in each of said years he returned to the bank and demanded his package, which was given him, and he opened the same and delivered it to an officer of the bank, asking that the amount should be placed to his credit as a general depositor, which was done. That on each occasion the defendant drew out the balance due him, with intent to obtain non-taxable securities, and thereby evade taxation on such balance; but that on each occasion during the time which intervened between the withdrawal and the subsequent deposit as a general depositor he was bona-fide the absolute owner of the money so withdrawn, and the same was subject to his disposal. That he did not in either of said years list for taxation any part of the money so paid to him, nor did he list the monthly average amount or value for the time he held or controlled the same within the preceding year any moneys, credits, or other effects within that time invested in or converted into the said securities so by him drawn out of bank, and that said monthly average amount so invested by the defendant in such securities within the years respectively preceding the drawing out of said moneys was the amount so drawn out at the end of the year. That the Auditor of said county placed said several sums upon the duplicate of said county for the year 1885, except

for the year '85 he erroneously placed $4,949 with fifty per cent. added thereto, making $7,420, whereas the data before him, and by which he should have been controlled authorized only $4,700, which with fifty per cent. added would make $7,050. And the Court further finds that the amount of taxes chargeable upon the aggregate of said several sums, if the same are subject to taxation, is $2,317.05, and that said duplicate was delivered to the Treasurer of said county for collection."

On the foregoing findings of fact the Court rendered judgment in favor of the defendant, as follows:

"And the Court being of opinion that upon the facts so found, the law of this case is with the defendant, it is thereupon considered that the defendant recover of the plaintiff his costs herein expended, taxed at $20.60."

Exceptions were thereupon entered by the plaintiff below and the case was taken on error to the Circuit Court, where the judgment was reversed and a judgment rendered in favor of the county treasurer for the amount of the tax, as follows:

"November 29, 1886, being Circuit Court term time. This day came the parties by their attorneys, and this cause coming on to be heard upon the errors assigned, was argued by counsel, upon consideration whereof, and this Court being fully advised in the premises, do find that there is error in the record and proceedings of the Court of Common Pleas as alleged in the petition in error, to which finding, said defendant, Shotwell, excepts.

"It is thereupon ordered and adjudged by this court that the said judgment of the Court of Common Pleas of Harrison county, Ohio, in favor of this defendant and against the plaintiff in error, be and the same is hereby reversed at the costs of this defendant. To which said defendant, Shotwell, excepts. And this court proceeding now, according to law, to render the judgment which said Court of Common Pleas should have rendered in said action in said court. It is considered, ordered, and adjudged by this court that the plaintiff, Samuel A. Moore, as Treasurer of Harrison county, Ohio, recover of said defendant, Stewart B. Shotwell, the sum of twenty-four hundred and twenty-two dollars and seven cents debt (counting interest to the first day of this term of this court, to-wit, November 23d, 1886.)

"To which said defendant excepts. And also the sum of $20.60, the costs of the trial in said Court of Common Pleas, to which said defendant excepts. And also the costs of this proceeding in error, taxed at $———, to all which said defendant excepts."

The judgment thus rendered by the Circuit Court was, on error, affirmed by the Supreme Court of the State, and this proceeding is now prosecuted to obtain a reversal of that judgment, as will more fully appear by the record.

ARGUMENT.

Two questions are presented for consideration:

1. Did the conversion of the deposits of the plaintiff in error, into government securieties for one day of the year, as shown by the record, operate to relieve him from taxation

thereon, or was such conversion a mere shift or device which the law does not recognize or aid?

2. Is the statute of Ohio, which requires the monthly average value of property invested during the year in non-taxable securities to the extent such securities may be held on the day preceding the second Monday in April, to be returnable for taxation, in conflict with any of the provisions of the Constitution of the United States or valid laws passed by Congress?

I.

The issue is not, as claimed by counsel for plaintiff in error, whether the plaintiff was "required by law to list for taxation the United States treasury notes, commonly called 'greenbacks,' which were owned by him *bona-fide* and absolutely, on the Saturday preceding the second Monday of April in the years 1881, 1882, 1883, 1884 and 1885."

All agree that "greenbacks" are non-taxable for State or municipal purposes, either directly or indirectly. The United States statutes not only prohibit such taxation, but the credit and safety of the general government require that all its securities should be protected from local tax regulations. Bank of Commerce vs. New York, 2 Black, 620. Banks vs. New York, 7 Wallace, 16. New York Bank vs. Supervisors, Id. 26.

The claim of the plaintiff, in this respect, is not controverted. The pertinent question, however, arises—can this principle of the law be used as a shift or device to escape taxation on other property? We maintain that it can not.

The findings of fact show that the temporary conversion of the deposits of plaintiff into "greenbacks" was expressly for the purpose of evading taxation. They were not so converted for any legitimate business or use. The "greenbacks" continued in the bank, wrapped up in a separate package, it is true, but still left there as "money on deposit subject to *order*." The plaintiff had the full use and benefit of this money as a *general* deposit, for every day in the year except one, and it would seem to be a travesty on the law to permit him, in the manner proposed, to throw upon other tax-payers his share of the public burdens while receiving, in common with all other citizens, the benefit of the law of the State for the protection of life and property. It would be worse than travesty; it would be giving judicial sanction to a palpable, open, confessed fraud on every honest tax-payer of the State.

The late Honorable Chief Justice of this court, in the opinion in the case of Mitchell vs. Board of County Commissioners, 1st Otto, 206, charactreizes a similar transaction as a "scheme to escape his proportionate share of the burdens of taxation," and he judicially rebukes it in unmistakable language.

The findings of fact in that case are so nearly identical with those in the case at the bar, that we quote in full:

"Mitchell, the plaintiff, kept his account with a banking firm in Leavenworth. On the 28th of February, 1870, he had a balance to his credit of $19,350, and subject to his check in current funds. He, that day, gave his check for this balance payable to himself in United States notes. These notes were paid to him. He immediately inclosed

them in a sealed package and placed them for safe-keeping in the vault of the bank. On the 3rd of March he withdrew his package and deposited the notes to his credit. This was done for the sole purpose of escaping taxation on his money on deposit.

"Personal property in Kansas, which includes money on deposit, is listed for taxation, as of March 1st in each year. Mitchell did not list any money on deposit. The tax officers, in due time, on discovery of the facts, added $19,000 to his assessment on account of his money in bank. He asked the proper authority to strike off this added assessment. This was refused. A tax was thereupon in due form levied and its collection threatened."

The facts in the above case are the exact counterpart of those in the one now under consideration, except that, under the laws of Kansas, there was no provision made for valuing the monthly average amount of property converted during the year into government securities. It presented the clear-cut question of the validity of such attempted evasion. It is insisted, however, that as the question was presented to the equity branch of the Court, the decision is not binding in a court of law. But is this the rule? The Court, it is true, confined itself, as was proper, to a strict affirmance of the principle on which the State Court decided the case, to wit, that "A court of justice, sitting as a court of equity, will not, knowingly, lend its aid to promote any scheme devised by a person to escape his proportionate share of the burdens of taxation." That was as far as the Court could go without disregarding the plain limitations of a reviewing tribunal. It is not the province of error courts to announce abstract prop-

ositions of law, not necessarily involved in the affirmance or reversal of the judgment of subordinate courts. It was ably urged, in argument, that the motive of Mitchell in so converting his deposits into "greenbacks," was wholly immaterial, and that the tax officers of the State of Kansas could not look beyond the nature and character of the property on the one day as of which the personal property of the State was required to be listed. But the scrupulous Chief Justice was unwilling, even by silence on a point not strictly before the Court, to seem to sanction such view of the law, and he therefore characterized the transaction as a questionable "scheme," and condemned it as such. So anxious was he that the case should not be understood as an authority, limited in scope to purely equity causes, that he added to the simple words of affirmance, the remark that Mitchell's "remedy, *if he has any*, is in a court of law."

The sole difference in the method of procedure in the case of Mitchell, supra, and the one at bar, is the fact that the treasurer, whose duty it was to collect the taxes, instead of proceeding by distraint, as he might well have done under the law, and thus forced the plaintiff in error to go into a court of equity for relief, chose the less objectionable remedy by bringing an action at law. The statutes of Ohio expressly authorize either method, and we submit that there is no logical reason why a Court, sitting as a court of equity, will refuse to interfere with the collection of an alleged illegal tax when threatened by arbitrary distraint, and yet, when sitting as a court of law, will refuse its aid to enforce the collection of the same tax by ordinary process.

Taxes are either legal or illegal. If illegal, the Chancellor should restrain their arbitrary enforcement, and, if legal, courts of law should not withhold their aid in their collection. It cannot be a case of mutual wrong-doing where neither party is given countenance in any court. The issue joined by the petition and the answer and cross-petition covered all possibilities of the case at law or in equity. Had the finding and judgment of the Common Pleas Court that "the law of this case is with the defendant," not been reversed, it would have been as effectual as an ordinary injunction proceeding to restrain the country treasurer from exercising the power of distraint, or any of the other powers with which he was clothed for the collection of taxes. The action of the defendant was a clear attempt to perpetrate a fraud on the public revenues, and, in such cases, neither a court of law or equity will shield him.

In the case of Holly Springs S. & I. Co. *vs.* Marshall County, reported in 52 Miss. 281, the questions in the case at bar are thoroughly considered.

In delivering the opinion, Chalmers, J., on p. 285, said: "The question presented is, therefore, whether a banking institution can avoid taxation by an investment of its means in the non-taxable securities of the government, where it is admitted and satisfactorily established that such investment was neither intended to be permanent nor to continue until the interest or the will of its managers should dictate a change, but with the sole intention of escaping taxation, and with the predetermined purpose of reconverting its means as soon as practicable after the day of assessment."

On page 287 the Judge continues: "Addressing ourselves to the main question in the case, as hereinbefore stated, we think that the court below did not err in holding the capital stock of plaintiff in error to be taxable under the state of facts as disclosed by the record. As before remarked, it was made satisfactorily to appear that the means of the institution were invested in government securities a few days prior to the first of January, and were reconverted a few days thereafter; that this reconversion was contemplated and fully intended at the time of the purchase of the bonds and treasury notes, and that the entire transaction was initiated and carried through for the express and avowed purpose of escaping the burden of taxation."

In commenting upon the case of Mitchell *vs.* Commissioners of Leavenworth County, *supra*, the Court said: "Chief Justice Waite, following the opinion of the Kansas Court, held that a court of chancery will not lend its sanction and aid to a scheme so improper and fraudulent in its character, and he therefore remitted the complainant to his legal rights, if he had any. *We think that the learned Chief Justice and our Kansas brethren might well have gone further, and declared that a party cannot in this manner acquire rights which a Court,* EITHER OF LAW OR OF EQUITY, *will enforce.*"

Continuing, the Court said:

"It is argued that the savings institution was only bound by law to make out and deliver a list 'of all taxable property of which it was possessed on the 1st day of January preceding,' and that if on said day it was possessed of no property taxable by law, it cannot be made to pay taxes, and that the

State cannot inquire by what means it dispossessed itself of the property, or what are its intentions with regard to repossessing itself of it. There are, we think, two satisfactory answers to this reasoning. In the first place, it proceeds upon a too literal interpretation of the statute; and, in the second place, it overlooks the principle that fraud vitiates everything into which it enters, and nullifies the advantages which fair dealing would have conferred. When the State imposes the burden of taxation upon the property possessed by the citizen, it means both that of which he is the open holder and that which he has secreted and concealed. His cunning may in practice defeat the imposition upon the latter, but it is legally no less liable to the burden, and, when discovered, the duty will be exacted, no matter what the shifts and devices which may have been resorted to in order to escape.

"That a party can derive no advantage *in any court* from a fraud, confessed or exposed, may be considered axiomatic. Shall the *State alone* be debarred from asserting against a fraudulent taxpayer this wholesome principle which protects the rights of the private litigant? Was not the conduct of plaintiff in error in the case at bar a palpable fraud upon the revenue of the State, and is the State powerless to guard against it?

"It is shown by the proof that the savings institution has embarked in its business $32,000, which it keeps constantly employed at a profit throughout the year of 12 to 18 per cent. For a few days it invests these means in government securities, and claims thereby to escape taxation for the whole year, confessing at the same time that this momentary investment was made with no other view than that of escaping its duty of contributing to the support of the State gov-

ernment. That such conduct is a fraud in fact, as well as in intention, seems too plain for argument.

"It is urged, however, that the non-taxability of the national securities is guaranteed by the federal government; that their exemption from taxation constitutes one of the main ingredients of their value, and that this cannot be infringed by the State, no matter what are the circumstances under which they are held.

"This is freely conceded, as a general proposition, and yet it is not believed to affect the question involved, because there still remains power in the courts to investigate whether the holding is actual and *bona-fide*, or colorable only, and fraudulent. If held in the latter aspect, and as a mere representation of property temporarily concealed, which is to be uncloaked as soon as the visit of the tax assessor shall have been made, the courts will look through the sham, and measure the rights of the parties by the real nature of the transaction."

This is so strong a case, and so exactly in point, that we have quoted liberally from it, and especially call the attention of the court to a consideration of it.

A similar case to the one just cited is that of Jones *vs.* Seward county, 10 Neb. 154. On page 157, the Chief Justice, in delivering the opinion, says: "It appears from the bill of exceptions that the plaintiff was the sole owner of a bank at Seward, known as the State Bank. The amount of capital stock of this bank, if anythlng, does not appear in the record, nor is there anything to show that the bank is taxed any

way, except as it may be done through the plaintiff. It is conceded that United States bonds are exempt from taxation, and that money invested in good faith in such securities cannot be taxed. The court below found that the plaintiff did not purchase the bonds in question in good faith. Is this finding sustained by the evidence? We think it is. The plaintiff does not claim that the money was intended by him to remain invested in bonds. On the contrary, it appears from his own testimony that the investment was merely temporary. It is evident that the investment, if such it can be called, was not made for profit, although there was a small profit, less, however, than the interest accruing on the bonds, during the time he was the owner. The plaintiff appears to have had no communication with the agent purchasing the bonds, the business being done through one of the Omaha banks, and his purchase of United States bonds at other times, so far as appears, were insignificant compared with this. But it is said fraud is never presumed, but must be proved. This is true. But in what manner is it to be proved?" * * *

"In but few instances, comparatively, can fraudulent intent be shown by direct testimony, and therefore it is generally established by circumstantial evidence. In our opinion, the testimony establishes the fact that the bonds in question were purchased by the plaintiff, *not with the design of making a permanent investment,* but for the sole purpose of evading taxation."

After citing the well-known case of *Mitchell v. Commissioners of Leavenworth County, supra,* the Chief Justice says:

"Where a change is thus made for the sole purpose of defrauding the government of its just dues, to enable a party to escape the payment of his just proportion of the taxes imposed by law, he cannot shelter himself behind such temporary change in the character af his funds to escape taxation."

The syllabus of the case is as follows:

"On the twenty-ninth of February, 1876, one J., the owner of a bank, purchased, through a bank in New York, government bonds, which, with the premium, amounted to $41,650. The bonds were sold on the seventh of March of that year. *Held*—a mere device to escape taxation, and that the money was taxable."

In Poppleton *vs.* Yamhill County, 8 Oregon, p. 337, it was held: "If a tax-payer, having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrows a sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages, for the purpose of avoiding the payment of taxes on the same, such notes are taxable in the county where such tax-payer resides; and such deposit or transfer is a fraud on the revenues of the county."

A late decision upon this question was rendered in the case of Dixon County *vs.* Halstead, by the Supreme Court of Nebraska, reported in 37 N. W. Reporter, p. 621.

The Court, per Maxwell, J., says: "It is clearly shown,

however, that on the 3d day of March, 1886, the defendant purchased the bonds in question, and that he still possessed them in June of that year, and for aught that appears, is still the owner thereof. There is not a particle of testimony in the record from which it can reasonably be inferred that the defendant purchased the bonds in question with the intention of selling the same after the time for assessing property had passed. There is some inference of that kind, perhaps, from the fact that the bonds were purchased but a short time before the time of assessing property; but that alone is not sufficient to show bad faith. *Any evasion of that kind, to enable a party to escape his just proportion of the taxes imposed by law, should be frowned upon by the Courts, and a party not permitted to shelter himself behind such temporary change in the character of his funds.*"

The syllabus of the case is as follows: "Where a private banker, about a month before the time fixed by law for the assessment of property, converted his assets into United States bonds, *held,* that if the change in the character of the funds was merely temporary, the object being to escape taxation, *that such assets would be liable to be taxed,* and that the question of the *bona-fides* of the transaction was one of fact for the jury to determine."

In none of the above cases, however, are the facts stronger than in the one at bar, and we submit that in all said cases it is clearly decided that a conversion of taxable securities into United States bonds, or other non-taxable securities, temporarily, and for the purpose of evading the payment of the owner's proportion of State taxes, is a fraud in fact which will

not be shielded or countenanced by any court of law or equity.

Counsel for the plaintiff in error, at the bottom of page 25 of their brief, say: "It follows that *in an action at law*, the *motive* of the person making the exchange cannot be inquired into." In the light of the adjudications upon this question we cannot see how opposing counsel are able to draw any comfort from this position, for in the above cases the *intent* of the tax-payer in transferring or exchanging his moneyed credits into non-taxable securities has been expressly and emphatically dwelt upon by the Court, and treated as the turning point in the case.

Especially is this true in the case of Holly Springs S. & I. Co. *vs.* Marshal county, *supra*, (a case similar in principle and facts to the one here) where Chalmers, Judge, applied the broad doctrine "that a party can derive no advantage *in any court* from a fraud, confessed or exposed, may be considered axiomatic."

A similar doctrine is stated by Judge Cooley, in his work on Taxation, page 417, as follows: "When a party seeks affirmative relief in equity, *his motives may always be inquired into*, for the purpose of determining whether his case is deserving of favor."

That the plaintiff in error sought affirmative relief in equity is clearly apparent from his answer filed in the Court of Common Pleas, in which he prayed for an injunction, thereby invoking the equity powers of the Court. Having done this he should not now be permitted to insist upon the determination of the case as an *action at law only*, as claimed

by his counsel in their brief. His answer (in which he denied any indebtedness to the plaintiff) was more than a mere answer. It was an answer and cross-petition, or cross-bill, in which he clearly appealed to the equity side of the Court, and under which prayer the Court had full power to grant equitable relief.

In Klonne et al. *vs.* Bradstreet et al., 7 Ohio St., p. 323, it was held: "The answer of a defendant may be treated as a cross-petition, *and the proper relief granted under it,* if it contain a prayer for judgment and the necessary averments to show the party's right to such relief, under the proceedings instituted against him, although he does not, in terms, denominate the paper which he files, a cross-petition. The Court will decide, on inspection of it, whether, in substance, it contains the elements, and be in the nature of such petition."

II.

But we are not left alone, as were the authorities in the State of Kansas, to depend upon the manifest justice of the assessment, in the clearly established fact that the action of the plaintiff was simply an attempted fraud, a scheme, a device gotten up to avoid his proper share of the public burdens. The General Assembly of Ohio has wisely and equitably provided that each person required to list property for taxation shall include in his return "the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within

that time invested in, or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on the day preceding the second Monday in April."

The trial court found that such monthly average value was exactly equal to the amount so drawn out of bank and converted into "greenbacks," and therefore it is a matter of no moment, in the determination of this case, whether, under the circumstances, the "greenbacks" so held by the plaintiff on special deposit, were in fact taxable as such or not. It is insisted, however, that this is only an indirect method of taxing government securities. To state the proposition broadly, it is claimed that a citizen of the State may hold property and do business in Ohio, to an unlimited extent under the sanction and protection of its laws, for 364 days in the year and then, for the express purpose of evading taxation, turn his property all into "greenbacks" for the one remaining day of the year, and thus escape all liability to the State for the protection afforded to his life, property and business in common with those of other citizens and taxpayers, and that this may be repeated from year to year, *ad infinitum.*

The very proposition is its own best answer. If Mr. Shotwell can escape his equal share of the public burdens, in the manner proposed, the law for the taxation of moneyed capital and credits might as well be repealed at once and the theories of Henry George adopted *in its stead.* A single illustration will suffice: A. has one hundred thousand dollars safely invested in seven and eight per cent. mortgage securities,

and is not in debt. Such investment is taxable at its actual value in money, but, on the day preceding the day on which taxes are assessed, he telegraphs to New York, and purchases *on credit* a corresponding amount of non-taxable securities. His debits and liabilities, therefore, equal each other on the next day, and he makes no return of credits to the assessor. Having held his non-taxable securities in New York for one day, he instructs his broker to re-sell them aud pay off his New York debt, and he has thus escaped liability for taxes to the amount of two or three thousand dollars according to the tax rate at the place of his domicile. Moneyed capital, stocks and bonds are also readily convertible into government securities, and by like thimble-rigging can be easily placed beyond the reach of taxation. It will not do to say that the law does not permit debts, thus created, to be deducted from the liabilities of the debtor, as the rule invoked by plaintiff would also destroy that wise provision of the statute in question. The term "credits" has a recognized legal meaning in the Ohio statutes—Sec. 2730, *supra*—and the same has stood unquestioned since its original enactment, which was soon after the decision in case of Exchange Bank *vs.* Hines, 3 Ohio St., 1, cited by counsel for plaintiff. This use and meaning of the term has in fact become a part of the woof and warp of the tax laws of the State, and is recognized by the people, the General Assembly, and the courts alike, and what *was thought* at one time to be the adoption of a different rule in Bank *vs.* Hines, *supra*, is now no longer so regarded.

Taxation is one of the incidents of sovereignity. The

rule contended for by plaintiff in error, if given judicial sanction, will practically destroy the tax laws of the State; instead of uniformity we would have discrimination; instead of equality of burden, as contemplated by the constitution, the rankest inequality and injustice would prevail, and rascally chicanery be at a premium. The power of the State, to assess upon the property of its citizens taxes in some degree proportionate to the protection and benefits respectively received by them from the State, is as essential to the proper maintenance of the State government, as is the exemption of United States securities from State and municipal taxation, to the integrity and well-being of the Federal government.

This is all that the law in question proposes: It simply says to the citizen that, for the time certain taxable property shall be held by him during the year, he shall pay taxes thereon proportionately for the time he holds the same and receives the protection of the State thereon.

It deals justly with him. It would manifestly be as unfair to tax him for the whole year as it would be to permit him to escape taxation entirely. If he has owned in value, say twelve hundred dollars of any kind of taxable property, for one month, and then converted it into non-taxable securities and has kept them on hand during the remainder of the tax year, he pays on the one-twelfth of the amount, or on one hundred dollars valuation, and if he has held such property for a longer period, he is assessed in the same proportion. To prevent injustice, in case of the re-conversion of such securities into taxable property, it is provided that such

valuation shall not exceed the amount of securities on hand on the day property is required to be returned for taxation. The law is absolutely without an unjust or discriminating feature.

Nor can it operate injuriously, as claimed by plaintiff, in discouraging investments in the securities of the general government. The exact opposite is true. It holds out an inducement for the permanent conversion of idle and unproductive taxable property into government obligations at the *beginning*, instead of the *end* of the year, thus stimulating a constant demand for such investments. It may, it is true, aid in preventing persons from using United States securities as a means of perpetrating a fraud on the State revenues, but this can, in no legitimate manner, interfere with the value or safety of such investments.

Counsel for plaintiff in error rely on the decision of the Supreme Court of Indiana in Ogden, Treasurer, *vs.* Walker, 59th Ind. 460, and the dicta of Justice Howk in the opinion, are quoted at length. The importance thus given to the case is, we submit, somewhat exaggerated, especially in an error proceeding in this court, the object of which is to obtain the reversal of a decision rendered by a court of at least equal jurisdiction and standing with that of the Supreme Court of Indiana.

Besides, this same case was carefully considered by the Ohio courts, in arriving at the conclusion reached in the case at bar.

It will also appear, upon examination, that there is a broad distinction between the statute of Indiana, in reference to making a return for taxation of the monthly average

value of property converted into securities of the United States, and the one which is claimed by plaintiff to correspond to it in the Ohio statutes. The Indiana statute makes no provision to protect the tax-payer from double, or even more excessive taxation. But in Ohio, the aggregate of such monthly average value during the year can, in no instance, exceed the amount the tax-payer "may hold or control such securities on the day preceding the second Monday of April." If he holds no non-taxable securities on that day, he is not required to make return of such monthly average value of property converted into such sccurities, but simply returns the value of his taxable property then on hand. The Ohio statutes is strictly just to all citizens. The one who invests his means in non-taxable securities receives the full benefit of his investment by being relieved of taxation proportionately for the time he holds the same. Anything more or less would be unjust and inequitable, either to him or to other tax-payers. But in the Indiana statute no such limitation is found, and it may well be said to operate as a burden upon investments in the securities of the general government, inasmuch as the tax-payer is required to make return for taxation of such monthly average investments, even though he may have reconverted all of them into taxable property and held the same subject to taxation on the day fixed by law for making his return. The natural result of such a law, unlike the Ohio statute, would be to deter capitalists from investing in the securities of the United States, and to that extent would injuriously affect their value. Possibly this consideration may have influenced the Indiana

Court in coming to the conclusion "that it seems to us that it was the legislative intent to devise some method, if practicable, whereby bonds or other securities of the United States might be subjected to State and municipal taxation." Certainly no other substantial reason for such conclusion appears in the opinion. But in any event its effect as an authority is wholly lost when the provisions and operation of the Indiana statute are compared with the perfectly just and equitable provision of the Ohio statute. Instead of the latter being "an attempt to accomplish by indirection what could not be done directly, namely the taxation of bonds and other securities of the United States by State and municipal authorities," it recognizes the exemption of such securities from taxation and in terms requires the holder thereof to return the property with which he purchased them only for the fractional part of the current tax year he owns them and is protected in the use thereof by the State. This is the sole effect of the statute, and no amount of argument, however able, can add to or detract from its force.

The other authorities cited by counsel for plaintiff in in error, on inspection, will be found subject to greater objections. They are not even similar in principal or fact to the case under consideration. The remark quoted by counsel from the opinion of Danforth, J., in the case of People, *ex rel. vs.* Ryan, 88 N. Y., 142, covers the whole subject and shows conclusively that the reasoning, or rather the application of the reasoning, of the court in each case can not be applied in Ohio. In speaking of the transaction, out of which that case arose, the learned judge said: "The law

does not prohibit it, therefore does not apply and in such a case there can be no evasion. Whether the law shall be so extended as to prevent similar transactions is for the legislature to determine." But, on the contrary, the law of Ohio does *prohibit* the identical transaction now in question.

We submit, therefore, that whatever application the cases referred to might have had in principle, prior to the enactment of the Ohio statute under consideration, it can not now be said that the legislature of Ohio has neglected to extend the law so as to prohibit the evasion of equitable taxation in the manner attempted by the plaintiff in error.

This is the sole object of the statues, and the power to enact it (constitution and laws aside) is as essential in principle, as before stated, to the integrity of the State government, as the exemption of Federal securities from State or municipal taxation, is to the integrity and sovereignty of the general government. The rights of one should not be allowed to encroach injuriously on the perogatives of the other, each being wisely confined within strict constitutioal limits.

III.

But it is further insisted that the method provided by law for estimating the taxable vaiuation to be placed on property, converted during the year into non-taxable securities, is in conflict with Sec. 2, Art. XII of the State constitution, requiring all property to be taxed "by a uniform rule," and an excerpt from the opinion of Chief Justice Bartley, in the

case of Exchange Bank *vs.* Hines, ***supra***, is quoted and relied upon in support of it, as follows: "Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation."

The fallaciousness of this claim of counsel is shown in the further remark of the learned Judge in the same opinion, to wit: "The rule of taxation is prescribed by the constitution; but the *mode* of ascertaining the value of property is regulated by law." "It has been argued," said he, "that 'stock in trade' is subject to a different rule of taxation from that which is imposed on other property. This is a mistake. The difference consists, not in the *rule* or *burden* of taxation, but simply in the *mode* of ascertaining the valuation. The principle of valueing by an average has been introduced because stock is constantly changing the article of its investment and varying in the quanity on hand from month to month." The italics are those of the Chief Justice, and they serve to emphasize his meaning, and effectually dispose of the deduction sought to be drawn by opposing counsel from his language. The Court divide on other questions, but on this there was universal agreement. The bench and bar of the State snbsequently acquiesced in the construction thus given to this feature of the tax laws, and it became thereafter a recognized feature of State legislation. Many of the tax regulations of the State, including the one now under consideration, are based upon it. To illustrate: The property of railroad, insurance, express and telegraph companies, and numerous other corporations, is ***listed*** and ***valued*** by laws peculiar to each.

The property of bankers and brokers in this respect is also governed by laws applicable alone to their business; and, instead of being listed for taxation as of the second Monday of April like other property, bank shares are *listed* and *valued* as of the Wednesday next preceding the second Monday of May in each year. Sec. 2765 R. S. of Ohio.

The merchant and manufacturer return for taxation the monthly average value of property on hand during the year. Certain enumerated articles of property, horses, hogs, cattle, sheep, farm implements, etc., may be exhibited to the assessor for his valuation, whereas, the owner is required to return his own valuation of other classes of property under oath. Bankers, unincorporated banks, merchants and manufacturers pay taxes for a proportionate part of the year in certain cases, on commencing business after the day fixed by law for listing their property, a feature of the law applicable alone to those engaged in such occupations.

Other, and perhaps greater distinctions in the time and manner of valueing different kinds of personal property, might be pointed out, but the foregoing will suffice to show that the General Assembly and Courts of Ohio have not regarded Sec. 2, Art. XII of the constitution as fixing a rule for estimating the taxable valuation of property, or the time as of which any particular class of it shall be listed.

From the decision in Exchange Bank *vs.* Hines, *supra*, in 1853, down to the case of Wagoner *vs.* Loomis, 37 Ohio St. 571, in 1881, a period of 28 years, the principle of such legislation does not seem to have been questioned in any manner. In the 37th Ohio St. case, the subject came up

somewhat incidentally and was again promptly put to rest in the first section of the syllabus, as follows: "Statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule, according to its true value in money."

To break the force of the unequivocal language of the Courts of Ohio on the subject, counsel for plaintiff suggest that the method of levying taxes on merchants, manufacturers, and other business classes, is more in the nature of a charge upon their *business* than a tax upon property, and the case of The Western Union Telegraph Co. *vs.* Mayer, Treasurer, 28 Ohio St. 522, is cited in support of this position. But in that case the Court distinctly recognized, as does the law, that the company had practically no *property* to tax, and hence the State was justified in levying an *assessment* on its gross receipts as an equivalent for the privilege allowed such foreign corporation to do business in the State. There is no parallel between such an *assessment* and the ordinary State taxes which are levied upon the monthly average value of the merchant's stock of goods. His property is taxed. Its value is ascertained in accordance with a rule fixed by the General Assembly.

So, when the monthly average value of property converted into non-taxable securities, is taxed, it is a tax upon the *property*, not upon the business of making such investments. The distinction is as broad as a highway and he who runs may read.

The law, as we claim it, having been settled by construction of the courts of Ohio, so far as the *method* of levying the tax in question is concerned, the holding thus established will be followed by the United States Courts.

Witherspoon *vs.* Duncan, 4 Wall, 210. Taylor *vs.* Secor, 92 U. S. 575. Games *vs.* Dunn, 14 Pet. 322.

The question has, however, to some extent, been discussed by this court and the same principle recognized.

Pelton *vs.* Benk, 101 U. S. 143; Cummings *vs.* Bank, Id. 153; Bank *vs.* Kimball, 103 U. S. 732.

The design and effect of the provision of the statute in question, being simply to provide a method by which the state authorities can correctly estimate the value of property owned during a part of the year and converted into non-taxable securities, so that the owner may be assessed on such property only for the fractional part of the year he holds the same, it would seem that this particular feature of the law is not a subject for consideration in this court. It is a matter of State jurisdiction.

In a case somewhat kindred to the subject now under discussion, the Supreme Court of Connecticut, in Corwall, Exr. *vs.* Todd, 38 Conn. p. 443, held:

"Statutes relating to taxation are not penal, nor in derogation of natural right, and are to be construed as to carry into effect the obvious intent of the legislature, rather than to defeat that intent by a too strict adherence to the letter."

In County of Olmsted *vs.* Barber, 31 Minn. 256, it was held: "Every piece of property (not exempted) owes to the State its proportionate share of the amount necessary to be raised by taxation for the expenses of the government."

Before dismissing this branch of the case it may be well to consider briefly the essential nature and requisites of the taxing power of the State, and the manner of its exercise.

Puffendorff, in his elementary work, Chapter 9 of Book 7, says the State is "to see that these impositions (taxes) be levied according to the justest proportion, and that no immunities or exemptions be granted to certain persons, to the defrauding or oppressing of the rest."

In Rutherforth's Institutes of Natural Law, 273, it is said that "the burden of those payments, which are called taxes, or duties and customs upon goods both moveable and immovable, ought to be proportioned, as near as may be, to the value of each person's property; because the more a man's property is worth, the more he is naturally willing to pay for the security of it."

We have found no more just statement of this subject, than that by an old law-writer, who said, "a man who evades his just share of the taxes that support the government that protects him, is not otherwise than as one who sits down to a feast with his fellows and when it is over silently steals away before the account is settled."

Justice Bartley, in Bank *vs.* Bond, *supra*, page 700, recognizes these elementary principles, and says: "It is clearly an essential quality in the taxing power that its *burdens* be

apportioned, as near as may be, to the value of each man's property; and that no *immunities* or *exceptions* be granted, favoring certain persons and thereby defrauding or oppressing the rest." Again, in 3d Ohio St., 11, the same learned judge states the rule thus: "Taxation is that tribute for the support of government imposed on property in return for the protection and advantages which the government affords to the owner. It is an essential and fundamental principle in the exercise of the power of taxation, that the burden should be imposed or apportioned with all practicable equality and justice."

The constitutional rule, adopted by the convention of 1850, in Ohio, is seen therefore to be only an embodiment of long established usages and principles on the subject of taxation, and it would seem passing strange, at this late day, if its aid could be invoked to invalidate a statute, the end and aim of which is simply to apportion the burdens of taxation equitably, by requiring each owner of property, when he converts it into non-taxable securities, to pay taxes on the value of such property proportionately for the time he has held, enjoyed and been protected in the use thereof by the State, during the current tax year. The provisions of the statute apply to all persons and property alike, and seek to approximate that absolute equality of burden contemplated by the constitution and the fundamental principles of every system of jurisprudence known among men; the rule contended for by the plaintiff, on the other hand, would subvert all just ideas of taxation, would substitute craft for honest dealing, and, if upheld by the courts, might lead to consequences dangerous to the government itself.

IV.

Counsel for plaintiff present another and certainly novel proposition, in the claim that, even if the plaintiff has been properly charged with taxes for the years 1882, 1883, 1884, and 1885, the judgment of the Circuit Court should have been so far modified by the Supreme Court of Ohio, as to relieve him from the taxes claimed for the year 1881. It is urged that the effect of the judgment is, to require him to pay double taxes for that year. But how so? This is not, perhaps, such a question as a Federal Court will feel much concern about, but the facts, as found by the trial court, and which are not controverted, show that he should have made return of the monthly average value of property converted into non-taxable securities for the year preceding the second Monday of April, 1881. On that day, he had wrapped up in a package in bank, the sum of $30,900, in "greenbacks," which he had on the previous day drawn out of bank; and it furthur appears from the findings of fact, that he did not "list the monthly average amount or value for the time he held or coutrolled the same *within the preceding year* any money, credits or other securities so by him drawn out of said bank, and that said monthly average amount so invested by the defendant in such securities, *within the years respectively preceding the drawing out* of said money, was the amount so drawn out at the end of the year."

The assertion of counsel that plaintiff in error made a proper return of the taxable property held by him during the year 1880, does not thsrefore seem to be sustained by the evidence.

Besides, no tax law is absolutely perfect, and neither the Constitution nor laws of Ohio forbid double taxation in certain contingencies. The farmer pays full taxes on his farm, although he may be indebted and have it mortgaged for the full amount of its value ;the merchant pays on the "monthly average value of his goods" although he may have purchased them on credit, and it would not be exceptional if tax laws should occasionally bear heavily upon the capitalist. Certainly the conduct of the plaintiff in error, as shown by the findings of fact in the trial court, does not commend him to the especial consideration of courts of justice. On the property in question he has never paid any taxes for the assessment of 1881 ; how, then, can there be double taxation, even if forbidden, by a judgment covering only simple taxes without penalty for that year ?

Respectfully submitted.

D. A. HOLLINGSWORTH.

JOHN M. GARVEN,

County Solicitor.

DAVID K. WATSON,

Attorney-General of Ohio.